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978
No. 2679

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Plaintiffs in Error,

VS.

H. M. FAGERBERG,

Defendant in Error.

VOLUME I.

(Pages 1 to 224, Inclusive.)

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Fourth Division.

Filed

DEC 15 1915

F. D. Monckton,

Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

Messrs. LYONS & RITCHIE, Valdez, Alaska,
Mr. C. F. WILT, Tacoma, Wash.,

Attorneys for the Defendants and Plaintiff in
Error.

Messrs. DONOHUE & DIMOND, Valdez, Alaska,
Attorneys for the Plaintiff and Defendants in
Error. [4*]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal and
JAS. M. MILLSAP, Deputy United States
Marshal,

Defendants.

Amended Complaint.

Comes now the above-named plaintiff, and, for
cause of action against the above-named defendants,
alleges as follows, to wit:

I.

That the above-named defendant, F. R. Brenne-
man, is the United States Marshal for the Third
Judicial Division of the Territory of Alaska; and

*Page number appearing at foot of page of original certified Record.

that the above-named defendant Jas. M. Millsap is a deputy United States Marshal for said division and territory, appointed by and serving under the said defendant, Brenneman, and is now stationed at McCarthy, Alaska. That both of said officers are duly qualified. That the acts hereinafter complained of were done and performed by said defendants acting in their official capacities as United States marshal and deputy United States marshal, respectively, as aforesaid. (Amended by interlineation this 10th day of May, 1915, by leave of Court. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.)

II.

That on the sixth day of August, 1914, the plaintiff was the lawful owner and in possession of and entitled to the possession of a certain roadhouse, together with the appurtenances, the land about the said roadhouse and upon which the said roadhouse is situate, all furniture and [5] equipment in said roadhouse, and all barns and outbuildings in connection with the said roadhouse, situate at what is known as the town of Blackburn, Alaska, at Mile 192 of the Copper River & Northwestern Railway, and within the jurisdiction of this court, the same being commonly known as the "Blackburn Roadhouse," also five head of horses, and harnesses, saddles, sleds, wagons and general equipment, all of which will more fully appear by reference to a complete inventory of said property attached hereto and made a part hereof, and marked Exhibit "A."

III.

That thereafter and on the said sixth day of Au-

gust, 1914, while plaintiff was so seized and possessed of said property and entitled to the possession thereof, the said defendant Millsap, acting at the instance of and authorized by the defendant Brenne-man, wrongfully and unlawfully and by force, and against the will and over the protest of said plaintiff, ousted and ejected plaintiff from said roadhouse, and took possession of the same, and took possession of all of the property above described and set forth in Exhibit "A" and deprived plaintiff of the use and possession of said property, and has since at all times denied, and does still deny to plaintiff the possession of said property.

IV.

That plaintiff, at the time the said property was so seized by the said defendants, was engaged in running the said roadhouse as a public roadhouse, and was using the said horses in doing a general freighting and packing business to the surrounding mining camps, and in said business was making an average daily profit of thirty dollars (\$30.00), which sum plaintiff claims as his damage for each day that he has been deprived and will be deprived of said property; That plaintiff has been further damaged by the wrongful and unlawful acts of said defendants in so depriving him of his [6] property, on account of demoralization of trade and loss of business prestige, in the sum of \$2,000.00; that plaintiff has been further damaged in the sum of \$1,000.00 on account of personal expenses incurred and necessary to be incurred in this action.

V.

That the value of the property described herein,

and an inventory of which is set forth in Exhibit "A," not including the land mentioned therein, is \$8,350.00, and that plaintiff has been further damaged in that sum, to wit, \$8,350.00, by reason of the wrongful taking and detention of said property as aforesaid.

WHEREFORE, Plaintiff prays judgment against the defendants and each of them as follows, to wit:

1. That plaintiff be adjudged and decreed to be the owner and entitled to the possession of all of the property described above, and set forth in Exhibit "A."

2. That plaintiff have and recover of and from the said defendants all of the property herein described, or the value thereof, viz., \$8,350.00, in case the delivery of said property cannot be had; for his damages in the sum of three thousand dollars, and for the further sum of thirty dollars per day as damages for the interest on the money invested in said property, and as damages in being deprived of the use of said property.

3. For his costs and disbursements in this action, and

4. For such other and further relief as to the Court shall seem just.

DONOHUE & DIMOND,
Attorneys for Plaintiff. [7]

United States of America,
Territory of Alaska,—ss.

H. M. Fagerberg, being first duly sworn, deposes and says: That he is the plaintiff named in the within Amended Complaint; that he has read the same,

knows the contents thereof, and that the same is true he verily believes.

H. M. FAGERBERG.

Subscribed and sworn to before me this 2d day of January, 1915.

[Seal]

F. R. BARNES,

U. S. Commissioner in and for the Chitina Precinct,
Territory of Alaska.

Service of copy acknowledged, at Valdez, Alaska,
this 7th day of January, 1915.

E. E. RITCHIE,

One of Attorneys for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jan. 7, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[8]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Amended Answer.

Comes now the defendants, by their attorneys,
C. E. Bunnell and Lyons & Ritchie, and by leave of

Court first had and obtained, file this, their amended answer, and admit, deny and allege as follows:

I.

Referring to paragraph 1 of plaintiff's amended complaint, defendants admit the allegations therein contained.

II.

Referring to paragraph 2 of said amended complaint, defendants deny each and every allegation therein contained, except as hereinafter stated.

III.

Referring to paragraph 3 of said amended complaint, defendants deny each and every allegation therein contained except as hereinafter stated and specifically admitted.

IV.

Referring to paragraph 4 of said amended complaint, defendants deny each and every allegation therein contained.

V.

Referring to paragraph V of said amended complaint, defendants deny that the property described and demanded in plaintiff's amended complaint, exclusive of the land, is or was at any time mentioned in said amended complaint, of the value of \$8,350, or any other sum in excess of \$1,500; deny that plaintiff has been damaged in any sum whatever by any act of defendants, and deny that any of said property was taken by defendants wrongfully. [9] For a further and separate answer to plaintiff's amended complaint defendants allege:

1.

That at all times hereinafter mentioned plaintiff herein and one J. A. Fagerberg were general partners, engaged in operating and conducting the roadhouse described in plaintiff's amended complaint, and were the joint owners of all of said property described in said amended complaint, and they are now the owners of all of said property; that plaintiff never was and is not now the sole owner of all of said property, nor of any part thereof.

2.

That during all the times mentioned in said amended complaint and during all the times mentioned in the complaint in civil action No. — now pending in this court, the said Carstens Packing Company was, and is now, a corporation duly organized under the laws of the State of Washington.

3.

That on the 31st day of July, 1914, the plaintiff *herein*, the said J. A. Fagerberg, were general partners, engaged in operating said roadhouse as aforesaid, and were then and there indebted to the said Carstens Packing Company in the sum of \$6,274.47 and interest; that on said last-named day the said Carstens Packing Company commenced an action in the above-entitled court against the said J. A. Fagerberg to enforce the collection of the above-named sum then and there due from the said J. A. Fagerberg and the plaintiff herein, doing business as Fagerberg Brothers, to said Carstens Packing Company, and thereafter in said action a summons was duly issued out of this court, and an affidavit and

undertaking for attachment were duly filed therein, and thereafter a writ of attachment was duly issued in said action out of the clerk's office of said court and delivered to the United States Marshal of the Third Division of Alaska for levy; that thereafter, under and by virtue of said writ of attachment the said marshal, F. R. Brenneman, one of the defendants herein, by his codefendant, James M. Millsap, deputy marshal, duly levied upon the property described in the amended complaint and took the same into custody. [10]

4.

That said action of the Carstens Packing Company against J. A. Fagerberg was filed by E. E. Ritchie, one the attorneys for plaintiff therein, without full information regarding the same from said Carstens Packing Company; that said Ritchie drew and verified the complaint upon the facts as they had been hurriedly communicated to him, and he was not aware that H. M. Fagerberg was a partner of J. A. Fagerberg in all dealings of said J. A. Fagerberg with the Carstens Packing Company; that when the amended answer was filed by said Ritchie in this cause, setting up that said Carstens Packing Company had learned since the filing of said company's case against J. A. Fagerberg that J. A. Fagerberg and H. M. Fagerberg were partners the same was done on information written to said Ritchie by a Seattle attorney of said Carstens Packing Company; that said amended answer was drawn by said Ritchie and verified by him without communication with any officer of the Carstens Packing Company,

and the mistake of fact contained in it is due to misunderstanding of attorneys through slow communication between Seattle and Valdez; that plaintiff herein was actually, during all the times mentioned in the amended complaint herein, a partner of said J. A. Fagerberg; and plaintiff herein and said J. A. Fagerberg during all the times mentioned in said action, and during all the times mentioned in this action, were general partners, engaged in conducting said roadhouse; and said indebtedness, alleged in said action of Carstens Packing Company against said J. A. Fagerberg to be due from said J. A. Fagerberg to said Carstens Packing Company, was actually due and owing, at all times mentioned in said complaint in said action, from the firm of Fagerberg Brothers, composed of plaintiff herein and said J. A. Fagerberg.

5.

That on or about July 15, 1913, said J. A. Fagerberg, for the purpose of hindering, delaying cheating and defrauding the creditors of said firm of Fagerberg Brothers, executed and delivered to plaintiff herein, a pretended bill of sale, whereby said J. A. Fagerberg pretended to transfer and convey to plaintiff [11] herein all the property described in plaintiff's amended complaint herein which was then owned and possessed by said Fagerberg Brothers, together with a general store building, and all goods, wares and merchandise contained therein, situated at Chititu, Alaska; said bill of sale was without consideration, and was made solely for

the purpose of hindering, delaying, cheating and defrauding the creditors of said Fagerberg Brothers and of J. A. Fagerberg; and plaintiff accepted said bill of sale knowing that the same was made by said J. A. Fagerberg for the purposes aforesaid; and plaintiff in receiving said bill of sale for all of said property received the same for the purpose of aiding in hindering, delaying, cheating and defrauding the creditors of Fagerberg Brothers, consisting of plaintiff herein and said J. A. Fagerberg and any separate creditors of said J. A. Fagerberg; plaintiff herein never gave any consideration of any kind or character for said pretended transfer to him by said J. A. Fagerberg by said pretended bill of sale.

6.

That all of said property described in the amended complaint herein was attached by defendant Mill-sap, as deputy United States marshal, acting for and under the defendant Brenneman, United States marshal, under *and virtue* of said writ of attachment issued in said action of Carstens Packing Company against J. A. Fagerberg; that the amount sued for in said action, to wit, the sum of \$6,274.47 was then and there due from plaintiffs herein and said J. A. Fagerberg, doing business under the name of Fagerberg Brothers, to said Carstens Packing Company, and all the property attached by virtue of said writ of attachment in said action was at the time the property of plaintiff herein and said J. A. Fagerberg, doing business under the name of Fagerberg Brothers.

Wherefore defendants ask that this action be dis-

missed at the cost of plaintiff and that defendants have judgment for their costs herein expended.

C. E. BUNNELL and
LYONS & RITCHIE,
Attorneys for Defendants.

United States of America,
Territory of Alaska,—ss.

F. R. Brenneman, being duly sworn says he is one of [12] the defendants in this action; that he has read the foregoing amended answer and he believes the same to be true.

F. R. BRENNEMAN.

Subscribed and sworn to before me this 8th day of January, 1915.

[Notarial Seal] THOS. P. GERAGHTY,
Notary Public.

My commission expires Feb. 15, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jan. 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [13]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United
States Marshal,

Defendants.

Reply.

Comes now the above-named plaintiff, and for reply to the amended answer of defendants on file herein says:

I.

Replying to the first paragraph of defendants' affirmative defense as set forth in said answer, plaintiff denies each and every allegation therein contained.

II.

Referring to the second paragraph of defendants' affirmative defense, plaintiff has no knowledge or information from which to form a belief, and therefore denies the same.

III.

Referring to the third paragraph of defendants' affirmative defense, plaintiff admits that on or about the 31st day of July, 1914, a suit was filed in the above-entitled court wherein the plaintiff was Carstens Packing Company and the defendant J. A. Fagerberg; that in said suit summons was issued out of said court; that an affidavit and undertaking of attachment were filed therein, and that a writ of attachment was issued out of said court; that said writ of attachment was put into the hands of defendants for service, and that defendants were acting under said writ when they ousted and ejected plaintiff and deprived plaintiff of the use and possession of the property in controversy, as set forth in plaintiff's complaint on file herein, and denies each and every other allegation therein contained.

IV.

Referring to the fourth paragraph of said affirmative defense, plaintiff denies each and every allegation therein contained. [14]

V.

Referring to the fifth paragraph of said affirmative defense, plaintiff says that on or about the 15th day of July, 1913, J. A. Fagerberg made and executed and delivered to plaintiff a deed and bill of sale, conveying to plaintiff all of the property described in plaintiff's amended complaint, together with the general store building and the goods, wares, and merchandise therein contained, situated at Chititu, Alaska; denies that said deed and bill of sale was without consideration, was made for the purpose of hindering, delaying or defrauding or cheating any of the creditors of plaintiff or J. A. Fagerberg, or both, or that said deed and bill of sale was received with the intent or purpose of so delaying, hindering, cheating or defrauding any of said creditors, and states that said deed and bill of sale was given and received for an adequate and valuable consideration, and denies each and every other allegation in said paragraph contained.

VI.

Referring to the sixth paragraph of said affirmative defense, plaintiff admits that the property described in said amended complaint was taken by the defendant Millsap, as deputy United States marshal, acting for and under defendant Brenneman, United States marshal, under the writ of attachment issued in the action of Carstens Packing Company

against J. A. Fagerberg, and denies that J. A. Fagerberg, or that any person other than plaintiff had any interest in said property at the time of the seizure thereof by defendants; alleges that plaintiff was the sole and lawful owner of said property and that its seizure under said writ of attachment was wrongful and unlawful, and denies each and every other allegation in said paragraph contained.

WHEREFORE, plaintiff prays judgment as in his complaint.

DONOHUE & DIMOND,
Attorneys for Plaintiff. [15]

United States of America,
Territory of Alaska,—ss.

I, H. M. Fagerberg, being first duly sworn, depose and say: That I am the plaintiff named in the above-entitled action, and that the foregoing Reply to Amended Answer is true as I verily believe.

H. M. FAGERBERG.

Subscribed and sworn to before me this 10th day of May, A. D. 1915.

[Seal] CHAS. A. HAND,
Deputy Clerk of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,—ss.

Due and legal service is hereby accepted, this 19th day of Feb., A. D. 1915, by receiving a copy thereof, duly certified to by Anthony J. Dimond, one of the attorneys for the plaintiff.

JOHN LYONS,
One of Attorneys for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Feb. 18, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [16]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United
States Marshal,

Defendants.

Bill of Exceptions and Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard, at Valdez, Alaska, on Monday, May 10, 1915, at 10 o'clock A. M. of said day, before the Honorable Fred M. Brown, Judge of said court, and a jury:

The plaintiff herein being represented by his attorneys and counsel, Messrs. Donohoe & Dimond:

The defendants herein being represented by their attorneys and counsel, Messrs. Lyons & Ritchie:

The jury having been empaneled and sworn, opening statements were made by Mr. Dimond on behalf of the plaintiff and by Mr. Ritchie on behalf of the defendants:

Whereupon the following additional proceedings were had and done, to wit: [17]

FAGERBERG vs. BRENNEMAN ET AL.

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*Page-number of Original Certified Transcript of Record.

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[Testimony of H. M. Fagerberg, the Plaintiff, in His Own Behalf.]

H. M. FAGERBERG, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination, by Mr. DIMOND.

Q. What is your name?

A. H. M. Fagerberg.

Q. You are generally known as Harry Fagerberg? A. Yes, sir.

Q. Where do you reside?

A. Blackburn, McCarthy.

Q. How long have you resided in Alaska?

A. For the last ten years.

Q. When did you come to Alaska?

A. Ten years ago,—the spring of 1904.

Q. When did you first go into the Nizina country?

A. In the spring of 1907.

Q. When did you first consider going in there?

A. In the spring of 1907.

Q. Where were you at that time?

A. In Seattle.

Q. With whom did you first take up the proposition of going in?

A. With my brother, J. E. Fagerberg.

Q. What did he say to you in that connection?

A. He wanted to know if I would take up a proposition of running a store in *at* Nizina for him and Carstens under a wage agreement. I told him I would if it was a satisfactory proposition to me.

Q. Did you make any positive agreement when

(Testimony of H. M. Fagerberg.)

you were in Seattle? A. No, there was not.

Q. He was coming to Alaska at that time, was he not? A. He was, yes, sir. [19—2]

Q. On what business, other than this, if any?

A. Cattle.

Q. And you came along with him? A. Yes, sir.

Q. What do you mean by cattle? What was he doing with these cattle?

A. He was to take them into the Kennecott mines and along the trail on the way in there, different people—anywhere that he could sell them.

Q. These were live cattle? A. Yes, sir.

Q. And you accompanied him from Seattle and along the trail? A. Yes, sir.

Q. Where did you first make any positive agreement as to going into this store at Chittitu or Nizina?

A. On the Kotsina River, crossing the Copper.

Q. Tell the circumstances of that, if you will.

A. At that time he expected to go through with those cattle to the Kennecott mines, dispose of them there and then go on and look the Nizina proposition over, to see the condition of things there, but when he got to the Kotsina, he was informed he couldn't dispose of the cattle at Kennecott and along the line and it was up to him to go back with the cattle, so he made the proposition to me there on a wage agreement of \$1,500 a year, if I would go in there and look after it and run it for him and Mr. Carstens. I was also to have a third interest in any ground I located there for them.

Q. What kind of ground?

A. Placer ground or any other mineral ground—

(Testimony of H. M. Fagerberg.)

besides I had the right to do any outside work as long as it didn't interfere with my work in connection with the store. [20—3]

Q. What about the pay you were to receive from this outside work?

A. That was mine, that was my own. At the same time my money—it was understood then that I was to leave my money, let them have the use of it; I was to give them a reasonable time to use the money.

Q. In other words you were not to demand your pay immediately?

A. No, I was not to demand my pay immediately.

Q. Was there any specific time in which you could not demand it? A. No, there was not.

Q. Who was running this store at Chittitu?

A. Aleck Wilson was keeper.

Q. Whose store was it? Under what name was it being conducted? A. The Nizina Trading Company.

Q. Did you ever learn who owned the Nizina Trading Company?

A. My understanding was that it was Mr. Carstens and Meyers.

Q. Now, in this agreement you made with your brother J. A. Fagerberg, was there any agreement that you were to share in any of the profits of the business? A. There certainly was not.

Q. If they had made a million dollars in there, you couldn't have claimed any of it? A. No, sir.

Q. How about the losses?

A. They were to share them the same way.

(Testimony of H. M. Fagerberg.)

Q. You were to get your wages irrespective of any profits or losses?

A. My wages were guaranteed.

Q. Who guaranteed them?

A. My brother guaranteed them.

Q. For himself alone? [21—4]

A. My understanding of it was, it was for himself and Mr. Carstens.

Q. How long did you continue in the employ there of your brother and Mr. Carstens at Chittitu?

A. At Chittitu from August first, 1907, until along in the winter of 1910.

Q. Did you ever receive any of your salary for any of this time?

A. Not anything, only for my clothes and actual expenses and they were very small.

Q. That is, you took your clothes out of the store?

A. Yes, I took my clothes out of the store.

Q. Do you know what that amounted to, in all these years?

A. During that time, as long as I was over there, my actual expenses wouldn't amount to more than five or six hundred dollars.

Q. Did you keep an itemized account of those expenses for the time you were at Nizina?

A. I did.

Q. Did they ever pay you any money on your salary up to 1910?

A. Not any actual cash, no, sir, only as I say; I had some dental work and one thing and another like

(Testimony of H. M. Fagerberg.)

that done here on trips to Valdez; that was paid by them.

Q. How did you come to make these trips to Valdez, on your own business?

A. Business for them, pertaining to the business—freighting in supplies and one thing and another of that sort.

Q. How often did you come to Valdez during this time? A. Once.

Q. This was the time you had the dental work done?

A. This was the time I had the dental work done.

Q. What did that cost? Do you recollect about what it cost? A. I think it was \$23. [22—5]

Q. And you say you stayed at Chittitu until the fall or winter of 1910, is that true? A. Yes, sir.

Q. What time did you leave Chittitu Creek itself?

A. I left in the latter part of September and during the winter of 1910 I would make regular trips over there from Kennecott, every week or every two weeks.

Q. In your absence from Chittitu, who was conducting the store over there?

A. There was no one there at all.

Q. There were very few people in there that winter—at that time? A. Very few.

Q. Where did you go then, in the fall of 1910?

A. Went to Kennecott, Blackburn.

Q. How far is that from Chittitu?

A. Practically twenty miles.

Q. Kennecott and Blackburn are near the end of

(Testimony of H. M. Fagerberg.)

the Copper River & Northwestern Railroad?

A. Yes, sir.

Q. This was before the railroad was constructed you went over there? A. Yes, sir.

Q. What did you do at Kennecott and Blackburn?

A. It was preparatory work for putting up a building—logging, getting out logs and laying the foundation—preparatory work.

Q. Did this contract made with J. A. Fagerburg in the fall of 1907 still continue?

A. It was still in force.

Q. Was there any supplementary contract by which you were to have any interest in this business at Blackburn? [23—6]

A. There was not—there was nothing of the sort whatever.

Q. And did you put up a building there?

A. Yes, sir.

Q. State to the jury what this Blackburn road-house and works there generally consist of?

A. The house itself consists of fourteen rooms upstairs, a dining room and a kitchen, well-equipped, downstairs and a large lobby, besides a sitting room and a store room on one side and a wareroom on the other, and a dormitory on the third floor, and there is a barn, a story and a half practically, with storing room for nineteen horses; a blacksmith-shop, just an ordinary 14x16 building, well equipped and other outbuildings.

Q. Did you put all these buildings up in the winter of 1910 and 11?

(Testimony of H. M. Fagerberg.)

A. In the spring of 1911 we started the actual construction of the buildings.

Q. Are they log buildings?

A. They are.

Q. Who helped put them up?

A. Myself and Leschamps and another man, I forget—Lindquist.

Q. Where was Al Fagerberg during this winter?

A. He made one trip in there in December, I think it was, and the balance of the time he was in Seattle, in the spring—he was there during the winter.

Q. During the years that you were at Chittitu, was Al at Chittitu very much?

A. Just made trips in there occasionally.

Q. How often would he come in?

A. He would come in in the spring and sometimes during the summer.

Q. Did he bring in any extra stock in the spring for the store? A. Yes, sir.

Q. Did he bring in any extra stock in the winter and spring of [24—7] 1908?

A. In the spring, yes, sir.

Q. And 1909? A. Yes, sir.

Q. And 1910? A. Yes, sir.

Q. Every spring? A. Every spring, yes, sir.

Q. And sometimes he would bring cattle in, in the summer? A. Yes, sir.

Q. And sell them to the operators there?

A. Yes, sir.

Q. Did you ever make demand on Al for your wages during all these years? A. I did.

(Testimony of H. M. Fagerberg.)

Q. Frequently? When did you make your first demand?

A. The first demand I actually made, that is, a serious demand, was in the fall of 1910.

Q. What did he say then? Did he pay you?

A. No, he did not.

Q. Go ahead.

A. I asked him—I had the money; I had practically \$3,800 in my possession then, and I told him I wanted my money. “Well,” he says, “after I put you in here and give you a chance to make this money, you are going to pull it out and give me and Carstens no chance at all, when there is a chance to make some money.”

Q. And the upshot of it was, you turned the money over to him and didn’t hold it out?

A. I didn’t hold the money out of him,—I stayed with him. [25—8]

Q. And when did you next make a demand on him for your wages? A. It was in the spring of 1913.

Q. Are you sure it was 1913?

A. 1912 I believe it was.

Q. Did he pay you any money then?

A. He did not.

Q. Just tell what occurred at that time if anything in this connection?

A. Things were coming very good for him and things didn’t look good to me and I went to him and demanded my money. Well, he says, he didn’t have it and couldn’t pay me. I went after him pretty strong. Well, he said, it didn’t do any good,

(Testimony of H. M. Fagerberg.)

he didn't have it and couldn't pay me and the consequence was it wound up in a rumpus, a free-for-all.

Q. In other words, you had a personal combat?

A. Yes, sir.

Q. At any rate, you didn't get any money?

A. I didn't get any money, no, sir.

Q. Did you enter into any other agreement between yourselves at that time or soon after that time as to wages, which in any way modified the first agreement? A. Yes, sir.

Q. Tell the jury what that was and all about it.

A. At that time it seems they were in debt to Blum & Company and Mr. Brock came up there and tried to adjust the difficulty and make things satisfactory for everyone and there was a contract drawn up at that time where I was to get \$4,000 on my wages within six months, I think it was, as near as I can recollect, in different payments. Besides I was to get same bench claims staked on Chittitu by myself—I was to get free title to them. [26—9]

(By the COURT.)

Q. What was the date of this latter agreement?

A. This was 1912.

Q. What time of the year?

A. It was in the spring.

By the COURT.—I might say to the jury as we go along, if any of you desire to ask any questions at any time to clear up a matter or understand it fully as you go along, you may do so.

Mr. RITCHIE.—I think part of this is inadmissible,

(Testimony of H. M. Fagerberg.)

but I think probably it is better to let Mr. Fagerberg tell his entire story.

Direct Examinaation (Continued).

(By Mr. DIMOND.)

Q. At this time as I understand you, you agreed that you had \$4,000. coming to you, and whatever was advanced, that you put into these bench claims on Chittitu and upon demand, he couldn't pay it at that time and you agreed to wait a while longer?

A. Yes, sir.

Q. What about your wages?

A. From that time on, I was to get \$100 per month.

Q. That is, you reduced it a little? A. Yes, sir.

Q. Who was present when this settlement was made with you? A. Mr. Brock.

Q. Who is Mr. Brock?

A. He is manager for S. Blum & Co., Cordova.

Q. Was it he who drew up this greement?

A. Yes, sir, it was.

Q. Do you know where that agreement is now?

A. I don't know where it is—I have lost the agreement.

Q. Have you made a search for it? [27—10]

A. Yes, sir.

Q. And cannot find it? A. No, sir.

Q. Was this agreement as to wages between you ever modified after that time?

A. No, sir, it was not.

Q. That continued how long?

A. Well, it continued until the spring of 1913.

Q. Did Al pay you any moneys under this agree-

(Testimony of H. M. Fagerberg.)

ment for wages, any of that \$4,000, any time later?

A. No, he did not.

Q. Did you ever make a demand for it?

A. Yes, sir.

Q. And what was his reply?

A. Well, he said, in the fall of 1913 that he couldn't do anything with it, but would go out and take the matter up with Mr. Carstens and see what he would do and if Carstens wanted to pay me my wages—

Q. When was this? A. In the fall of 1913.

Q. Are you sure? A. 1912 rather.

By the COURT.—Fix the time if you can.

The WITNESS.—Why, it was in the fall of 1912.

Q. Go ahead and tell your story.

A. And he said he would take the matter up with Mr. Carstens and if Mr. Carstens wanted to protect me and pay my salary, why he would settle it that way, but if he couldn't do that, why he was to turn the business over to me—if Mr. Carstens didn't want to do that, why the business was to come to me.

[28—11]

Q. For what? A. For my salary.

Q. What do you mean when you say the business?

A. Well, the roadhouse and what the business consisted of there.

Q. Did it consist of the roadhouse and barns?

A. The roadhouse and barns and pack horses and equipment.

Q. Furniture?

A. Furniture and whatever there was around the place of business.

(Testimony of H. M. Fagerberg.)

Q. When did you next hear from Al about this?

A. It was along in July.

Q. What year? A. 1913.

Q. What did he say—did he write to you himself?

A. He did not, not himself.

Q. How did you get word from him then?

A. From George Custer.

Q. Who is George Custer? A. An attorney.

Q. Where does he live? A. In Seattle.

Q. What kind of information did you get from him?

A. Well, he says—it seems that Al had taken the proposition up with Carstens and couldn't do anything and he got instructions from my brother to turn the property over to me and he was to prepare the papers, send them out to me.

Q. What papers did he send you?

A. Bill of sale, powers of attorney and one thing and another.

Q. I now hand you an instrument dated the 15th day of July, 1913, signed by J. A. Fagerberg and ask you what that is?

A. It is a bill of sale from my brother to myself for the property [29—12] at Blackburn and Nizina.

By the COURT.—Does that include the store and stock of goods?

The WITNESS.—There was no stock of goods there.

By the COURT.—When did you discontinue the store business?

(Testimony of H. M. Fagerberg.)

A. When my brother went out; when the lease was made to Breedman and Church.

Mr. DIMOND.—There were some goods at Chittitu?

A. Yes, there were some goods at Chittitu,

By the COURT.—Who was running that business?

A. There was no one there at that time—Mrs. Cole was up there prior to that time.

By the COURT.—This stock of goods then at Nizina does not enter into this case at all, does it?

Mr. DONOHOE.—No, sir.

By the COURT.—All that is involved in this case is the roadhouse, with the furniture and equipment around the roadhouse?

Mr. DONOHOE.—Yes, sir, and five head of horses.

Mr. RITCHIE.—The property is all at Blackburn that is sued for in this action.

Mr. DONOHOE.—Yes, the property is all at Blackburn that is sued for in this action. This is introduced to show the matters that led up to it.

The Bill of Sale is marked Plaintiff's Exhibit "B" (Exhibit "A" being part of the complaint) and read to the Jury by Mr. Dimond, as follows:

[Plaintiff's Exhibit "B"—Bill of Sale.]

KNOW ALL MEN BY THESE PRESENTS,
That J. A. Fagerberg, the party of the first part, for and in consideration of the sum of four thousand five hundred (\$4,500.00) dollars, lawful money of the United States of America to him in hand paid by [30—13] H. M. Fagerberg, the party of the second part, the receipt whereof is hereby acknowledged,

do by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, a certain house with the appurtenances located at Mile 192, Copper River & Northwestern Railroad, District of Alaska, with the lease of the ground upon which the same is situated; furniture and equipment, all outbuildings and other structures in connection therewith; also 7 head of horses, harness and equipment, blacksmith shop, barn, also store at Nizina, Alaska, with contents and equipment, including fixtures; also outstanding accounts, and all personal property in the District of Alaska belonging to party of the first part—

TO HAVE AND TO HOLD the same to the said party of the second part, his executors, administrators and assigns forever. And I do for my heirs, executors and administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 15th day of July, in the year of our Lord one thousand nine hundred and 1913,

J. A. FAGERBERG. (Seal)

Signed, sealed in presence of

GEORGE A. CUSTER.

State of Washington,
County of King,—ss.

This is to certify that on this 15th day of July, A. D. 1913, before me the undersigned a notary public in and for the State of Washington, duly commissioned and sworn, personally came J. A. Fagerberg, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal]

GEORGE A. CUSTER,

Notary Public in and for the State of Washington,
Residing at Seattle. [31—14]

No. 1706. Filed for Record by J. A. Fagerberg at 5 P. M. Aug. 9, 1913. Recorded in Vol. 7, page 184, Chitina Recording District, Territory of Alaska.

PAUL d'HEIRRY,

Recorder.

Q. What did you do with that paper when you got it?

A. I sent it to Chitina to have recorded.

Q. Your place is in the Chitina recording precinct?

A. Yes, sir.

Q. The consideration recited therein as appears by that instrument is \$4,500—is that the true consideration for the transfer? A. Practically, yes.

Q. When you say practically, was the real con-

(Testimony of H. M. Fagerberg.)

sideration any more or any less?

A. Why it would be a little more, to get down to the fine points.

Q. What do you mean by that, why would it be more?

A. Well, my time, if I was allowed for expenses since the agreement was made—I figured that is what I actually had coming.

Q. Did you have more money than that coming at that time from J. A. Fagerberg, July 15, 1913?

A. Yes, I think I did.

Q. How much more?

A. It was practically about \$500 more than that, —practically \$800.

Q. \$800 more than is stipulated there— then that would be \$5,300? A. \$5,300 that I had coming.

Q. Was there any encumbrance on the roadhouse at that time? A. Yes, sir, there was.

Q. Do you know how much it amounted to—at the time this bill of sale was made how much was due and unpaid on it?

A. I looked it up after it was turned over to me; the mortgage [32—15] was \$2,600 if I recollect right still due at that time.

Q. In whose favor was this mortgage?

A. Blum & Company.

Q. Did you go into actual possession of this property at that time?

A. To this extent, that I notified Church that I was in possession of the building, the building belonged to me and I was still in possession of the

(Testimony of H. M. Fagerberg.)

horses, in the packing end of it.

Q. Who was Church?

A. He was the man running the roadhouse at that time under lease from my brother.

Q. When did your brother execute this lease on the roadhouse, do you know?

A. In the fall of 1913, I think it was, some time along there.

Mr. DIMOND.—I want to ask the witness whether or not he is not mistaken—

The WITNESS.—1912, I mean.

Q. And at that time, then, in the fall of 1912 your brother executed a lease to Church? A. Yes, sir.

Mr. RITCHIE.—If they have the lease, we should like to have it offered.

Mr. DIMOND.—We have the original lease.

Q. State whether or not this is the lease you have reference to—examine it first. (Handing witness paper.)

A. Yes, sir, that is the lease I have reference to.

Q. I don't see the name of Church there; instead of that there is the name of S. O. Breedman—can you state who S. O. Breedman was?

A. He was a partner of Church's as near as I understand. At the [33—16] time I notified Church, Breedman was not there—he was in the Shushana.

Mr. DIMOND.—I will offer this lease in evidence.

The lease is admitted in evidence, without objection, marked Plaintiff's Exhibit "C" and read to the jury by Mr. Dimond as follows:

Plaintiff's Exhibit "C" [Lease].

This Indenture, made this 16th day of November, 1912, by and between J. A. Fagerberg, of Kennecott, Alaska, lessor, and S. O. Breedman, of Cordova, Alaska, lessee, witnesseth:

That, for and in consideration of the rents, covenants and agreements hereinafter specified, to be paid, kept and performed by the said lessee, the said less hereby does demise and let unto the said lessee, for a term of three years from and after the 20th day of November, 1912, with the option of renewing this lease and extending said term for an additional term of two years thereafter upon the same terms, whose certain premises situated and described as follows, to wit:—The Blackburn Road House situated near mile 192 of the Copper River and Northwestern Railway, heretofore operated as a roadhouse by Fagerberg Brothers, together with all the furniture and fixtures situated and being therein and used in connection with said roadhouse business; also all out-houses situated upon said premises and used in connection with said business, save and except the horse barn and the blacksmith shop, it being understood and agreed that the said lessee shall have the use of one-half of said horse barn during said term, or until such time as the said lessor shall have built a barn upon said premises for the use and occupancy of said lessee. And the said lessor further agrees to furnish the necessary logs and to construct an addition to said roadhouse 20 by 28 feet in dimensions, one story high, and to fully complete the same, the said lessee to furnish all materials therefor except the logs to

be furnished by the lessor; and said addition shall be completed as soon as the weather conditions will permit, not later than the 1st day of January, 1913, the said lessee yielding and paying therefor, as rental, the sum of two hundred dollars per month, payable in advance on the —— day of each and every month during the continuance of said term and any renewal thereof under the terms hereof, it being understood and agreed that the last three months' rental together with the rental for the first month shall be paid upon the ensealing of these presents, and that no further payment for the last three months of said term, or if a renewal is had, for the last three months of such renewal, shall be required of or made by said lessee.

And the said lessee hereby promises and agrees to pay said rentals at the times and in the manner above and hereinafter stipulated, and to keep said premises in good repair, as at present, reasonable wear and tear thereof being considered and allowed. [34—17]

And it is hereby stipulated and agreed by and between said lessor and said lessee: that all rentals to be paid by said lessee, except those paid upon the execution of this lease, shall be paid by said lessee to the bank of S. Blum & Company, at Cordova, Alaska, for the purpose of being applied upon a certain note and mortgage made by said lessor to said S. Blum & Company, upon said leased premises, until said note and mortgage are fully paid and satisfied. And this understanding shall be considered as one of the essential conditions of this lease and be binding upon the parties hereto, the said lessor and said

lessee. The said lessor hereby covenants and agrees to keep said premises insured in a reliable insurance company in the sum of at least Three thousand dollars, and the policies of insurance shall be deposited in the bank of S. Blum & Company, said insurance being intended for the protection of all of the parties hereto and of said S. Blum & Company, mortgagee, as their respective interests may appear at the time any loss covered by such insurance may occur. And the said lessor further agrees to warrant and defend the said lessee in the peaceable and undisturbed possession of said premises during the term of this lease, against the claims of all and every person lawfully claiming or to claim the same.

The said lessor, for the considerations herein named and of the sum of one dollar to him in hand paid, hereby gives and grants unto the said lessee an option to purchase the above-described and leased premises, at any time during the term of this lease or any extension thereof, for the sum of nine thousand dollars, as the full purchase price thereof, payable at the time of sale, and that any rentals that may have been paid by said lessee shall be applied upon said purchase price of nine thousand dollars, that is to say, the said lessee shall pay said sum of nine thousand dollars, less any sum he shall have paid as rentals under this lease. Provided, however, that if said option to purchase shall be exercised by said lessee at any time after the expiration of eighteen months from the commencement of this lease, the said lessee shall pay to said lessor, in addition, as purchase price, interest on the amount remaining to be paid, at the rate of eight per cent per

annum for the then unexpired time of the lease, and if the lease shall have been extended by renewal, for the unexpired time of such renewal. This option shall not include the barn to be erected by said lessor.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals this 17 day of November, 1912.

Witnesses:

J. Y. OSTRANDER,

S. BLUM.

J. A. FAGERBERG. (Seal)

S. O. BREEDMAN. (Seal) [35—18]

United States of America,
District of Alaska,—ss.

On this 18th day of November, 1912, before me, a notary public in and for the District of Alaska, personally appeared the within named J. A. Fagerberg, to me well known to be the same person described in and who executed the within instrument and acknowledged to me that he freely and voluntarily for the uses and purposes therein specified, executed the same.

Witness my hand and official seal the day and year in this certificate above written.

[Seal]

GEORGE DOOLEY,

Notary Public.

For and in consideration of the agreement contained in the foregoing lease, that the rentals accruing and to be paid by the lessee of the premises therein described shall be paid to S. Blum & Company, of Cordova, until the note and mortgage held by said S. Blum & Company against said premises

(Testimony of H. M. Fagerberg.)

shall be fully paid and discharged, the said S. Blum & Company hereby consent to the making of said lease. It being understood, however, that any failure to pay said rentals as in said lease provided shall release and absolve the said S. Blum & Company from said consent, and restore the right to proceed against said premises as if this consent had not been given.

Dated the 18th day of November, 1912.

S. BLUM & CO.

By S. Blum,

President and General Manager.

Q. Now, when Al gave you this bill of sale in July, 1913, either Church or Breedman was still in possession of the roadhouse under the lease to Breedman?

A. He was, yes, sir.

Q. And you say you gave Church a notification that you were the owner of that property?

A. I did, yes, sir.

Q. How long did Breedman & Church, or Breedman, hold these premises after that time, after July, 1913?

A. From that time until the first of March, practically the first of March, 1914.

Q. At whose instance was the lease thrown up?

A. My brother and myself. [36—19]

Q. Under the terms of the lease it continued for a considerable length of time longer did it not?

A. Yes, sir, it did.

Q. Did Breedman & Church agree to it?

A. Before my brother came up to McCarthy, during the winter of 1914, 1913 and 14, they were about

(Testimony of H. M. Fagerberg.)

to give the roadhouse up, but I went to them and made arrangements with them to the effect that they were to stay until the first of June, 1914, but my brother came up during this time, along in February of 1914 and made me a proposition of taking the business back, over again, on an incorporation plan and at that time he stated his plan to me and his proposition and I consented to it under certain arrangement and a certain contract and I told him then the condition that I had made with Church and I said, if you want to you can go down there and talk with Church and perhaps he will give you possession of it; now, that is the way of my brother taking charge of it the first of March; the lease and contract shows for itself, the way he got possession of it.

Q. Then on the first of March you leased the place to your brother? A. I did, yes, sir.

Mr. DIMOND.—We desire to offer this paper in evidence. (Handing a paper to Mr. Ritchie.)

Mr. RITCHIE.—We object to this on the ground that it is irrelevant to the real issue in the case and it is incompetent because it is not signed by the party or either one of the parties that is to be charged with it, and amounts to a self-serving declaration. The signatures are J. A. Fagerberg, Thomas [37—20] Carstens, by J. A. F. and H. M. Fagerberg, and unless there is some authority shown for J. A. Fagerberg to bind Thomas Carstens or the Carstens Packing Company, it can have no binding effect upon Thomas Carstens or the Carstens Packing Co. It is incompetent and irrelevant and a self-serving declaration.

(Testimony of H. M. Fagerberg.)

By the COURT.—You will have to follow it up by some proof of the authority to sign Carstens' name.

Mr. DONOHOE.—We do not hope to bind Carstens by that paper.

Mr. RITCHIE.—Even then it is a self-serving declaration.

By the COURT.—The objection will be overruled. It will be admitted and the jury will be instructed at the proper time as to the effect of it.

To which ruling of the Court counsel for defendant except and the exception is allowed.

Q. I herewith hand you a paper, dated the 23d day of March, 1914, and ask you to state what it is.

A. It is an agreement drawn up between myself and brother concerning the arrangements and the property.

Q. Where? A. At Blackburn.

The agreement is marked Plaintiff's Exhibit "D" and read to the jury by Mr. Dimond, as follows:

Plaintiff's Exhibit "D" [Agreement].

This agreement made and entered into this 23d day of March, 1914, by and between J. A. Fagerberg, Mgr., the party of the first part, and H. M. Fagerberg, the party of the second part, both of Blackburn, Alaska, Witnesseth:

That, Whereas, J. A. Fagerberg and Thomas Carstens have entered into an agreement of partnership, pending the incorporation [38—21] of a company to engage in the business of General Merchandise and Transportation at McCarthy, Blackburn, Nizina and Shushana, Alaska, and being desirous of en-

gaging the services of H. M. Fagerberg as packer and of leasing certain buildings and renting certain personal property owned by the said H. M. Fagerberg—

Therefore, It is now agreed by and between the parties hereto that the said H. M. Fagerberg does hereby rent and lease to the said J. A. Fagerberg and Thomas Carstens, partners, the following described property, to wit:

Ten head of horses at \$2.00 per day.

The Fagerberg Roadhouse at Blackburn, Alaska, together with all the personal property therein contained, at the monthly rental of \$150.

The Fagerberg store, connected with said Roadhouse together with the fixtures and show cases therein contained, at the monthly rental of \$50.00.

The Chititu store and roadhouse at the monthly rental of \$25.00.

The service of the said H. M. Fagerberg to be performed in sledding and packing to such places as are considered advisable by the said J. A. Fagerberg, Manager, and to be paid for at the rate of One Hundred Dollars per month.

The duration of this lease shall be six months unless sooner terminated by the organization of the aforementioned corporation, which said corporation is to be formed on the following basis: The capital stock to be \$50.00, of which stock H. M. Fagerberg is to receive 7,000 shares par value \$1.00 per share. On receipt of which stock H. M. Fagerberg agrees to deed all of the above described property to said corporation and which stock so received by the said H. M. Fagerberger, the said J. A. Fagerberg agrees

(Testimony of H. M. Fagerberg.)

to purchase at par [39—22] value on or before
September 1st, 1914.

J. A. FAGERBERG,
THOS. CARSTENS.

By J. A. F.

H. M. FAGERBERG.

Witness:

L. A. DAMON.

By the COURT.—At this time the jury will be instructed that the only purpose for which this exhibit “D” which has been introduced and read to the jury is admitted in evidence is to determine and relative to the question of ownership of this property as between J. A. Fagerberg and H. M. Fagerberg and so far as the name of Carstens appears in it, you will not consider that at all unless it further be shown by the evidence in this case that there was authority given by Mr. Carstens to enter into this agreement or to sign his name to any such paper; that so far as the recital in there that Carstens has entered into an agreement with J. A. Fagerberg is concerned, you will disregard that until it is shown by some competent evidence here that Mr. Carstens authorized such an arrangement. The only effect of this paper just read to you is, so far as it may aid you in determining whether J. A. Fagerberg or H. M. Fagerberg was the owner of this property.

Q. Who drew that instrument?

A. Mr. Foster.

Q. Who is Mr. Foster?

A. He is an attorney who was located at Chitina, but at present he is at McCarthy.

(Testimony of H. M. Fagerberg.)

Q. Where was the instrument drawn up?

A. At the roadhouse.

Q. Did he write that himself? [40—23]

A. He wrote that himself.

Q. It is in his handwriting?

A. Yes, sir, it is in his handwriting.

Q. Now, when did Al Fagerberg really go into possession of this property under this agreement?

A. I think it was the fourth day of March, 1914, he took possession.

Q. Why did you delay, then, in drawing up the agreement in writing?

A. There wasn't any attorney there and Mr. Foster happened to come up at that time from Chitina and I thought it a good opportunity to have an agreement drawn up and I had him do it at that time.

Q. Mr. Foster was not there on the fourth of March? A. No, sir, he was not.

Q. You never got the stock mentioned in this bill of sale? A. Never did, no, sir.

Q. Were you in the employ of J. A. Fagerberg from that time on? A. Yes, sir.

Q. What were your duties?

A. Most of the time I was carrying mail, packing and handling horses.

Q. Did you ever receive any of the rents or any of your wages mentioned under this contract?

A. I never did, no, sir.

Q. How long did you continue in the employ of J. A. Fagerberg?

A. About the first of August, I think it was.

Q. What caused the discontinuance?

(Testimony of H. M. Fagerberg.)

A. The attachment of goods in the store—that was the direct cause of it.

Q. Describe that attachment; tell what goods were attached and when. [41—24]

A. Why, it seems as if Mr. Carstens sent up a supply of goods to my brother—I suppose he knew the conditions, he sent it up himself and advanced him money; I don't know why he done it but he done it, and it seems as if they got fighting and quarreling between themselves about the stock.

Q. Where were you when the first attachment took place?

A. I was at Chititu when the first attachment was taking place.

Q. When did you arrive at Blackburn thereafter?

A. I arrived there that evening that the attachment was taken on the merchandise.

Q. Did you claim any of this merchandise?

A. I did not, no, sir.

Q. What date was this?

A. I think it was the second day of August.

Q. On the second day of August, who did the attaching? A. Jim Millsap, the deputy marshal.

Q. On the second day of August Mr. Millsap, the deputy marshal, attached the store—

A. Just the store.

Q. Containing these goods which belonged to your brother or to his creditors—anyway they didn't belong to you? A. They didn't belong to me, no, sir.

Q. This agreement which we have just read here in evidence, when was that terminated?

A. At that time; my brother says, "I can't do any-

(Testimony of H. M. Fagerberg.)

thing," and he says, "There is no use for me trying"; he says, "I will give it up"; he says, "You can take it and do what you please with it," and I went ahead and ran the business.

Q. Did he continue in possession of the roadhouse? A. No, sir. [42—25]

Q. Who did have possession?

A. I did myself.

Q. When was this?

A. This was on the evening of the second day of August when I returned.

Q. He turned the whole business over to you?

A. He turned the whole business over to me.

Q. And did you again continue to conduct it from that time on? A. Yes, sir, I did.

Q. When did the next attachment take place on the property up there?

A. The next day, I believe; I wasn't there then. I made another trip to Chititu, but I believe Millsap—my understanding of it is—he came the next day and attached the warehouses alongside the main building with some goods in them that he had not attached before.

Q. Did these goods belong to you?

A. No, sir, they did not.

Q. When did the next attachment take place?

A. I believe it was on the 8th day of August.

Q. Where were you at the time?

A. I was at the roadhouse working. He came up—

Q. Who did?

A. Millsap and his deputies—he had three depu-

(Testimony of H. M. Fagerberg.)

ties with him—and he said he had an attachment for the whole concern, buildings and horses and everything, he said they had to go ahead and serve an attachment. I said, “Do you know what you are doing”? “Yes,” he says, “I thoroughly understand what I am doing.” “Well,” I says, “I won’t give up possession, you will have to put me out.” “Well,” he says, “If that is necessary, I will do that,” and I says, [43—26] “Go ahead and do it,” and he took me by the shoulders and led me out. I told him, also, about the bill of sale and his deputies so they could see what they were doing exactly and they knew what they were doing at the time.

Q. Where were you at the time?

A. I was in the roadhouse.

Q. And he put you outside the door?

A. He put me outside the door, yes, sir.

Q. Did you tell him that that property was yours?

A. I told him that belonged to me.

Q. Where were they at that time?

A. They came in that evening; they were in the barn.

Q. What did he do with the horses?

A. He took possession of them; took them down to Breedman’s barn.

Q. Did you tell him the horses belonged to you?

A. I did.

Q. In whose possession was all this property at the time the attachment was made?

A. The possession of the property of the roadhouse, that was in my possession; of course, I don’t

(Testimony of H. M. Fagerberg.)

claim any of the stock of goods that were shipped in there by my brother or Mr. Carstens.

Q. What about the horses?

A. I claim the horses; the horses were mine.

Q. Were they in your possession at the time the attachment was made? A. They were; yes.

Q. How many horses were there? A. Five.

Q. Were these horses that were turned over by your brother, Al Fagerberg, and recited in the bill of sale of July 15, 1913? [44—27]

A. Two of them were and three of them were not.

Q. How did you come into possession of the other three? A. I bought them myself.

Q. And Al Fagerberg never owned those three horses?

A. Never did, never had nothing to do with them.

Q. From whom did you buy them?

A. I bought two from Mr. Seagraves, superintendent of the Kennecott mine and one from a fellow named Brooks.

Q. When?

A. In the fall of 1914, in the summer—one of them I bought in the summer, August.

Q. This attachment was made in August, 1914?

A. I mean 1913.

Q. What is the value of that roadhouse up there, I mean now only the store-house building and the buildings attached to it?

A. The roadhouse itself is worth about \$3,000. The barn is worth about a thousand and the outer buildings, blacksmith-shop and cow-barn and one

(Testimony of H. M. Fagerberg.)

thing and another like that are worth about \$200 or \$250.

Q. (By Juror). What is the size of the road-house?

A. It is in an L shape; the front part of it is 38 ft. by 20 and the back L is 22 by 32.

Q. (By Juror). Two stories?

A. Two stories and a garret, that is, a bunk-room.

Q. Does that include the store-room and warehouse alongside—does this property you have just described run along on each side of the main building? A. In front there is a story, one story.

Q. How large are these buildings?

A. Why, they are about—the store-room, that is, the selling-room, [45—28] as near as I can recollect, it is 20 by 28.

Q. And the other one? A. Is 18 by 28.

Q. Are all these buildings log buildings?

A. Practically, yes. The store building alongside the main building is lumber.

Q. Boards? A. Boards.

Q. Now, you say all these buildings you have just described here are worth \$3,000. How large is this barn?

A. The barn is 30 by, I think it is 48—I am not just positive on that point.

Q. What is it constructed of?

A. Logs; the upper part of it is lumber.

Q. How high is it, one story or two?

A. Practically, a story and a half.

Q. And a loft upstairs?

(Testimony of H. M. Fagerberg.)

A. And a loft upstairs; yes, sir.

Q. What other buildings have you around there?

A. A blacksmith-shop.

Q. What did you say the value of that was?

A. About \$100.

Q. Was there any furniture in the roadhouse at the time of this attachment—at the time the roadhouse itself was attached, the part you claim?

A. Yes, sir.

Q. Do you claim that you were in possession of that furniture at this time? A. Yes, sir, I was.

Q. What do you say was the value of that property?

A. In the neighborhood of \$2,000. [46—29]

Q. What does it consist of?

A. Well, there is the hotel equipment, such as bedding, general furniture that it takes to furnish up a place.

Q. Stoves?

A. Stoves, cooking utensils, a complete line of store fixtures, such as that.

Q. In other words, you had a completely equipped roadhouse there?

A. Yes, I had a completely equipped roadhouse there.

Q. How many guests could you accommodate?

A. There were fourteen rooms and upstairs there was something like 16 bunks, I think.

Q. How much are those horses worth that were attached by Millsap?

A. Well, they were worth to me \$200 a head.

(Testimony of H. M. Fagerberg.)

Q. And there were five of them? A. Yes, sir.

Mr. RITCHIE.—We move to strike that former answer.

By the COURT.—Yes, the question is what the horses were worth at that time and place.

The WITNESS.—If I had to buy horses at that time I would have to pay \$200 a head.

Q. Were horses very plentiful in the country at that time?

A. No, sir; not at that time—there was a good demand for horses at that time.

Q. Why?

A. It was packing season and the business was at hand.

Q. Did you have any other property there attached by the marshal that you claim?

A. The Chititu building.

Q. That doesn't enter into this suit. Was there any furniture in the barn?

A. Yes, there was a packing equipment and harness. [47—30]

Q. Any sleds? A. Sleds, wagons.

Q. What was the value of all that packing equipment, etc.?

A. The total would be about a thousand dollars, I should judge.

Q. That is practically all of the property that was attached by the marshal and which you claim?

A. Yes, sir.

Q. This blacksmith-shop—will you repeat what you said was the value of that?

(Testimony of H. M. Fagerberg.)

A. The building itself was practically worth about \$100.

Q. Were there any tools in there which went into this \$100? A. No, the tools would be extra.

Q. How much would you say was the value of those tools? A. Perhaps, \$75.

Q. Mr. Fagerberg, how much profit could you have made out of that Blackburn roadhouse during August and September, 1914?

Mr. RITCHIE.—We object to that unless he follows it up by definite figures showing in what way he could make it.

Judge LYONS.—If he is laying a foundation on which he bases his damages, he will have to show what he would make on each article.

By the COURT.—You can cross-examine as to that. Objection overruled. Defendants allowed an exception.

Q. Now, so far as the roadhouse and barn is concerned, inasmuch as it is part of the roadhouse, what would have been your profit there in the months of August and September, 1914, out of the roadhouse alone, not including these horses?

Mr. RITCHIE.—We object on the ground that the way the question is put, it would be testimony simply as to profits that are wholly speculative. [48—31]

By the COURT.—I think it is merely an opinion as to what he might do; I think you ought first to lay some foundation by showing what business he was doing and what the conditions were and how

(Testimony of H. M. Fagerberg.)

they remained or how they have been since that time. The objection will be sustained.

Plaintiff allowed an exception.

Q. What were the business conditions at that roadhouse at that time?

A. At the time I got this roadhouse—

Q. When was that?

A. That was the second of August—they were beginning to be good—naturally would be as a consequence of the state of the country. It is the packing season for the Chititu country and the Shushana country; the travel is good going into the Shushana and into the Chititu country; the travel is naturally heavy at that time of the year and the business in good.

Q. Was the business good at this time?

A. It was; I was working the horses and the business was good.

Q. How about the roadhouse?

A. There was a good business there.

Q. How many guests did you have there on the average?

A. At the time that the attachment was made on the roadhouse, there were five guests that were on hand that day, that had been staying there right along, steady guests, right along.

Q. And sometimes you had a great many more?

A. The house full.

Q. And sometimes you had none?

A. Sometimes I had none.

Q. Can you give an off-hand opinion as to the aver-

(Testimony of H. M. Fagerberg.)

age for the month, the number of guests that were there?

A. Not the exact number but on the average I could have made [49—32] \$300 per month clear of all expenses.

Mr. RITCHIE.—We move to strike that answer as not responsive. Objection sustained and answer stricken.

By the COURT.—Answer the question, about how many guests and about what they paid.

Q. About how many guests on an average did you have there?

A. Well, up to that time I don't think they would average over—that is, steady guests—they would average over six or eight.

Q. You say that business conditions at that time of the year usually improve?

A. They certainly would—they improve from that until along the latter part of October.

Q. And did they improve this particular year, 1914? A. They did; yes, sir.

Q. What are your profits per day on each guest that you had there? A. You mean clear?

Q. Yes, above the expense?

A. It would be about \$2.50.

Q. \$2.50 above all expense—what are your prices up there? A. A dollar for a room, 75¢ for a bunk.

Q. And what did you charge for a meal?

A. A dollar.

Q. In other words, a man staying all day and all night, you charge him \$4.00? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. How much of that would be profit?

A. I will change that, it wouldn't be \$2.50—it would be, practically, \$2.00 profit.

Q. You say during the month of July or about the time this attachment [50—33] was made, to be more exact, you think the average of your guests on or about that time was about seven or eight?

A. Yes, sir.

Q. And you made \$2.00 on each guest?

A. Yes, sir.

Q. And that the conditions in there last fall were such that you would have continued to have had about the same number of guests each day and make the same profit off of each one?

A. It would have been more; the business would have been better.

Q. You wouldn't make as much money as that along in the winter, would you? A. No, sir.

Q. How are business conditions up there in the month of November, we will say?

A. Along in November—

Mr. RITCHIE.—We object to this kind of questioning—it is nothing on which to base an action for damages. You have to show it by actual figures. This is too speculative.

Objection overruled. Defendants allowed an exception.

Q. What were the business conditions, so far as that roadhouse was concerned, in November last?

A. You mean the possibility of the business or the actual conditions of business?

(Testimony of H. M. Fagerberg.)

Q. The business was closed up, but what were the reasonable possibilities of the business? You were there all winter? A. Yes, sir.

Q. You were there in November? A. Yes, sir.

Q. And you know how much travel went through there at that time?

A. Naturally, along in November, the travel is not as heavy as [51—34] it is in August or September—the heavy travel is over.

Q. When does the heavy travel end?

A. The latter part of October.

Q. Along in November, then, there is very little travel? A. Not much travel.

Q. What about the month of December?

A. It is quiet, continues quiet, until along the first part of February.

Q. And from that time on it improves?

A. It begins to improve again.

Q. Now, had you remained in possession of that roadhouse, and knowing the conditions of business generally at McCarthy and the possibilities of this roadhouse business, what would you say would have been the average number of your guests during the month of November, 1914?

Judge LYONS.—We make the same objection, it is too speculative and too general.

Objection overruled and exception allowed.

Mr. RITCHIE.—I will object to any further testimony for the reason that Mr. Harry Fagerberg has already testified that there was a lease from him to Al Fagerberg, by which he was to receive so much

(Testimony of H. M. Fagerberg.)

rent; he also testified that Al Fagerberg gave up on the first of August on account of the attachment. Now, then, that brings about this situation that if the attachment which he is complaining of in this action had not been levied, he would not have been handling the roadhouse for himself and making two dollars a day on the guests, but simply drawing the rent Al Fagerberg agreed to pay him and we object to any testimony as to any profits he could have made running that roadhouse. [52—35]

Mr. DONOHOE.—The evidence shows it was thrown up four days before this attachment was made.

By the COURT.—That is my recollection of the testimony. The objection will be overruled and exception allowed.

Mr. DIMOND.—Answer the last question. Please read it, Mr. Reporter.

Question read as follows:

Q. Now, had you remained in the possession of that roadhouse, and knowing the conditions of business generally at McCarthy and the possibilities of this roadhouse business, what would you say would have been the average number of your guests during the month of November, 1914?

Judge LYONS.—We renew our objection.

Objection overruled and exception allowed defendants.

A. Well, perhaps three, straight through.

Q. November? A. Yes, sir.

Q. What about December?

(Testimony of H. M. Fagerberg.)

A. Practically run about the same.

Q. It would run the same all winter?

A. Until about the first of February.

Q. Then it would improve?

A. Yes, then it would improve again.

Q. How are conditions up there in the spring at McCarthy, in a business way, quiet?

A. Quiet to a certain extent; yes, sir.

Q. Do you think that the average number of guests you have named would have continued up to the present time?

Mr. RITCHIE.—We object to that as leading and suggestive.

Objection sustained. [53—36]

Q. How many guests do you think there would have been between the first of February and this date at the Blackburn roadhouse?

A. That is a rather hard question to answer but on an average, take it as a whole, why I should say about 120 guests per month, straight through on an average.

Q. Four a day? A. Yes, sir.

Q. What profit was being made off of the horses, off each horse, at the time the attachment was made?

A. Practically, three dollars per day.

Q. How long did that business continue?

Mr. RITCHIE.—Before there are any more questions about the horses I want him to tell what the horses were doing, who was handling them and from what he derived compensation for those horses.

Mr. DIMOND.—Answer that.

(Testimony of H. M. Fagerberg.)

The WITNESS.—I was handling them myself; they were doing a packing business to Chititu and Dan Creek.

Q. What were you packing over?

A. General freight and merchandise for Esterly and the Dan Creek Mining Company, and different people over in that section of the country.

Q. How much did you charge a pound?

A. Seven cents, flat rate, to Esterly and the Dan Creek Mining Company.

Q. How much of a pack train were you running at that time?

A. At that time I had eight horses.

Q. How many men did it take to handle them?

A. Myself, part of the time, once in a while, and Henderson.

Q. How many men does it take to run a pack train of eight horses? [54—37]

A. Two men; one man can do it on a pinch.

Q. What is your average pack horse over there?

A. 225 pounds.

Q. How long did it take to make a trip over to Chititu and Dan Creek and back?

A. She takes three days.

Q. In other words, every three days you take eight horses with 225 pounds each, that would be 2,000 pounds or 1,800 pounds, rather, and you say you got for that seven cents per pound?

A. Yes, sir.

Q. That would be \$126. Now, what is the wages of those two men, what is the ordinary rate of wages in there?

(Testimony of H. M. Fagerberg.)

A. \$100 per month. And, besides, we always pick up more or less packing coming back from the creeks that we usually get ten cents per pound for, bedding and blankets of the men and ferrying men across the river.

Q. The Nizina River has a ferry across it?

A. Yes, sir.

Q. It is a bad river to ford? A. Yes, sir.

Q. Did you have steady packing at the time the attachment was made?

A. Yes, sir, it was certainly steady packing, in fact the marshal came to me and got my permission and I gave my consent,—horses were so scarce and they were so hard up—I hired the horses from the marshal, you might say, for \$3.00 per day—that is what I was to get clear of them; that money is in the hands of the marshal at the present time.

Q. That was after the attachment?

A. That was after the attachment; the horses were so scarce and it had to be done before any arrangements could be made [55—38] with other parties to take the packing. Breedman has done the packing since, during those months.

Q. What months do you refer to?

A. August, September and October.

Q. All of October?

A. The biggest part of October.

Q. Up to the 20th, anyway?

A. Yes, up to the 20th, anyway.

Q. Now, did you have an opportunity during the past winter to make other money had you been in

(Testimony of H. M. Fagerberg.)

possession of this property you speak of and the horses? A. Yes, sir; I certainly would have.

Q. State what it is.

A. Contract with the Kennecott Mines Company for mining timbers and logging.

Q. What profit have you been deprived of by reason of this wrongful taking away of your horses?

A. I could have made practically \$2,000 clear on the piling contract, the timber contract.

Mr. RITCHIE.—We move to strike that unless he goes into detail, it is only an opinion.

Motion granted—answer stricken.

Q. What was this timber contract that you speak of?

A. Well, the Kennecott Mines Company advertised for bids on a certain amount of timber.

Q. How much was it? A. It was 50,000 feet.

Q. What kind of timber? A. Mining timber.

Q. What is mining timber? What is its general size and description— [56—39] what kind did they want, in other words?

A. From seven to twelve inches in diameter and 16 to 32 feet long.

Q. They wanted 50,000 feet of them?

A. Yes, sir.

Q. How much would it have cost you a foot to get that timber?

A. It would cost me about 3½ cts.

Q. How much were they willing to pay for it?

A. Six and a half cents.

Q. In other words, you could make three cents a foot? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. (By JUROR).—Is that linear feet or board measure? A. Linear feet.

Q. Fifty thousand linear feet of timber?

A. Yes, and that was increased to one hundred thousand.

Q. (By the COURT.) What were these horses doing that they couldn't do that work the same as they did packing in the summer?

A. They were tied up in the hands of the marshal.

Q. How did they become untied, so that they were able to do this packing?

A. There was a bond put up by Mr. Seagraves; Mr. Seagraves stood good for it, the Kennecott Mines Company.

Q. Where are the horses now?

A. They were sold.

Q. When?

A. Along in February, if I recollect right, 1915—I am not positive on that point, what month they were sold.

Q. Who sold them, do you know?

A. The marshal sold them.

Q. Were you particularly well qualified to get out this mining timber you speak of? [57—40]

A. Yes, sir.

Q. How?

A. The year before I and my partner had gotten out logs, one hundred and fifty thousand feet. We built roads through all the timber to get these logs and that left us in a good condition to handle this contract, on account of these roads being cut and the smaller logs left, what would answer the purpose for

(Testimony of H. M. Fagerberg.)

these mining timbers; and also under normal conditions, if I hadn't been tied up the way I was, I would have had the horses, sleds and equipment and the camp established down there to go ahead, after I was through with the packing—take the horses down there and put them to work in the woods getting out the timbers and getting out logs; and also there is 200 cords of wood that I could have kept right on with.

Q. As a result of these things that you have just testified to, what would you say was the total damage by reason of being deprived of those horses from the 20th day of October until the present time?

Judge LYONS.—We object to that; he must show each particular place he was damaged.

Mr. DIMOND.—I ask him to base his opinion on the items he has mentioned and this logging contract particularly.

Objection overruled; defendants allowed an exception.

A. On the mining and logging I could practically have made \$5,000.

Q. How long would that logging have lasted?

A. It could have lasted all spring, up until the packing set in.

Q. How much was there of it, did you say?

A. There was one hundred thousand feet of mining timbers.

Q. You mentioned something about cord wood—what was that? A. That was for the mine.

Q. How much? [58—41]

A. Two hundred cords.

Q. How much would that cost you to get it out?

(Testimony of H. M. Fagerberg.)

A. I wouldn't have made so much on that, but would have made practically about one dollar a cord clear—that is all I could have made on that,—that is allowing \$2.50 per day for the horses.

Q. Now, you figure it—100,000 feet of timber you say you could have made three cents per foot on; that is \$3,000 and \$200 on wood, and you state you could have made altogether \$5,000—where is the rest of it?

A. On account of the logging proposition—I was getting under my agreement with Borger and Struck \$2.50 per day for every day I put in getting out logs.

Q. Where were these logs used?

A. At the Borger-Struck mill.

Q. Where is that?

A. Mile 123 on the Copper River Railway.

Mr. DIMOND.—That will be all at this time.

Cross-examination by Mr. RITCHIE.

Mr. RITCHIE.—I want briefly to go over your testimony that you gave to Mr. Dimond in regard to your first arrangement in there, in the Nizina store, to be sure I have it right.

Q. As I remember your testimony, you went in there in the summer of 1907. A. Yes, sir.

Q. And you took charge of the store—

A. The first of August, 1907.

Q. And your arrangement was that you were to receive \$1,500 per year and keep, of course, I suppose? [59—42] A. Yes, sir.

Q. You were baching? A. Yes, sir.

Q. The \$1,500 was clear of your board, but any clothing or anything else you used were charged against you? A. They were, yes, sir.

(Testimony of H. M. Fagerberg.)

Q. And was it your understanding from Al that he and Carstens were in partnership in that?

A. Yes; and another thing, I was present on the steamboat at Seattle at the time he left Seattle when Myers came down and delivered the deed for this over to Al; that is the only time I knew anything of the transaction between Myers and Al and Carstens, and, naturally, hearing their conversation which was carried on in the cabin of the boat, why that was what I was basing my knowledge on of the conditions in there.

Q. Myers delivered the deed from the Nizina Trading Company to J. A. Fagerberg?

A. That was my understanding of it, yes, sir.

Q. Did you see the deed at that time?

A. Yes, sir.

Q. Was it afterwards filed?

A. That is my understanding of it, but I suppose the records will show.

Q. So your understanding was that you were working for Thomas Carstens and J. A. Fagerberg?

A. That was my understanding of it.

Q. And on that arrangement you started in on the— A. First of August, 1907.

Q. And you worked for about three years under that arrangement? A. Yes, sir. [60—43]

Q. And you also had a further arrangement that you could have some time to yourself—that is, you said something about locating property?

A. Why, yes, that was taken into consideration; after I got in there at Nizina, we made the final arrangements there, that I was to look out for any

(Testimony of H. M. Fagerberg.)

opportunity for locating mineral ground, placer ground or quartz or anything else, and if I should locate any of that, I was to have a one-third interest.

Q. And who was to have the other two-thirds?

A. I suppose Al and Carstens.

Q. You were not told positively about that?

A. No, sir.

Q. You had no instructions?

A. I had no instructions in regard to that; and another thing, during the winter months we understood it was quiet there and it was my understanding and my permission if I had any opportunity to make any money, as long as it didn't interfere with my work at the store, I should do this work and have the money and pocket it myself.

Q. The arrangement about mining was made on account of the fact that you would undoubtedly have some spare time? A. Yes, sir.

Q. And it was thought that your relations with Al Fagerberg and Carstens entitled them to some interest in what you did? A. That's the idea, exactly.

Q. Now, you worked constantly for about three years at the roadhouse? A. Yes, sir.

Q. And you say that you were in Seattle only once during that time? A. Once, yes. [61—44]

Q. And did you go to Cordova then?

A. I went through Cordova.

Q. You staid pretty steadily at the store and on the creeks?

A. Yes; at the time I went to Seattle I went through Cordova.

Q. You made one trip to Seattle, and then you

(Testimony of H. M. Fagerberg.)

went through Cordova? A. Yes, sir.

Q. When was that trip to Seattle?

A. In the fall of 1909.

Q. When you had been working there two years?

A. Yes, sir.

Q. Do you remember the month you quit the store in 1909?

A. I left the store in Chititu, I think, the latter part of September; of course, during that whole winter I made regular trips over there once a week practically.

Q. You were still in charge of the store?

A. I was still in charge of the store until along in the spring, until the spring outfit came in; I helped freight the spring outfit that went into Chititu—over there myself.

Q. Was there anyone in charge of the store all the time when you were gone?

A. No, it was closed when I was not there, and I had a notice on the door that I would be in on a certain day—that was the custom of the country.

Q. In the fall of 1910, you went at something else?

A. Yes, sir.

Q. You went to logging, I believe, you said?

A. I did, yes, sir.

Q. That was for the purpose of getting out logs to build the Blackburn roadhouse, I understand?

A. Yes, sir; and another thing, we got out logs—
[62—45]

Q. Who do you mean by we?

A. My brother and myself; I naturally say we since I was connected with the business and working

(Testimony of H. M. Fagerberg.)

there, Sam Rogers and myself; that is the way I put it; he was the man working with me, cutting these saw logs. We cut practically 80,000 feet of saw logs and hauled them to the mine, hauled then in the winter and they were out on shares by the Kennecott Mines Company, and half of them, half the lumber—it was divided.

Q. Divided between whom?

A. The Kennecott Mines Co. and my brother and myself.

Q. The purpose of that logging was to obtain lumber for the—

A. For the construction of the roadhouse.

Q. Did you go back at any time to run the Nizina store?

A. No, sir; not after the spring of 1911.

Q. You never were in active charge of the store for any length of time after you quit in the early fall of 1910?

A. No, sir; not while it was in operation.

Q. You stated that you worked around at different things during 1911—a good part of the time you were working on building the Blackburn roadhouse?

A. Yes, sir.

Q. And what time was that finished?

A. It was finished along in the fall; we started to build, the actual construction of the building, in the spring of 1911 and the barn and outbuildings, and it was finished in the fall, towards the fall.

Q. When did the railroad come through there?

A. It was in the spring of 1911, just about the time we started in to build the roadhouse.

(Testimony of H. M. Fagerberg.)

Q. You finished the roadhouse so it was ready for occupancy about August or September? [63—46]

A. Well, we were occupying the roadhouse along in the first part of June, 1911,—that is, the furnished part of it.

Q. But it wasn't completed until late in the summer? A. No.

Q. You were about to use a part of it?

A. Yes, sir.

Q. What did you do in the winter of 1911 and '12?

A. General work, freighting and any work that was to be done connected with the roadhouse.

Q. You worked around the roadhouse mostly?

A. Sometimes, and sometimes I worked anywhere where there was work to be done.

Q. Freighting? A. Freighting and packing.

Q. Where did you freight?

A. Out to the creeks and done some work for the Kennecott Mines Company, driving a team there.

Q. Did you or your brother have a mail contract at that time?

A. My brother had a mail contract at that time, I believe.

Q. What mail contract has he had up there?

A. He had the first contract that was let from McCarthy to Nizina.

Q. What year was that?

A. That was in 1911, I think it was 1911—1912, when the first contract was let.

Q. And he still had a contract last year?

A. Yes, sir.

Q. It was a four-year contract, made in 1910?

(Testimony of H. M. Fagerberg.)

A. No, a yearly contract, as far as I understand it; in 1913 I had a mail contract myself.

Q. From McCarthy to Chititu Creek? [64—47]

A. Yes, sir.

Q. Did you work in the roadhouse a good deal or mostly on the trail freighting?

A. Most of the time after the construction of the roadhouse I put in with the horses, working on the trail, freighting.

Q. That would be the fall of 1911, and all along through 1912? A. Yes, sir.

Q. Did you continue that kind of employment through most of 1912? A. Yes, sir.

Q. And in 1913?

A. And in 1913, practically the same.

Q. You have done more freighting than anything else for the last two or three years?

A. Yes, sir; I have.

Q. Did you work in the Blackburn roadhouse very much? A. No, not to any great extent.

Q. That wasn't your principal employment?

A. That wasn't my principal employment, no.

Q. When you were not on the trail you helped?

A. When I was not on the trail I helped some, yes, sir.

Q. You were not, however, for any length of time charged with the responsibility of it? A. No, sir.

Q. You testified a while ago that you drew \$125 per month until things got a little dull, until the spring of 1912 some time,—about the time you had a little trouble with Al over finances, and then you agreed to take \$100 a month? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. You had been working for Al steadily at \$125 per month up to that time? [65—48]

A. Yes, sir, only this one trip that I was out to Seattle—there was one trip I wasn't there.

Q. You didn't draw wages for that time?

A. I didn't draw wages for that time, no, sir.

Q. At the time you quit the store, or practically quit it, in the fall of 1910, how much was due you for back salary—at the time you say you quit the roadhouse and went into the logging camp—how much was due you for back salary at \$1,500 per year?

A. Well, there was practically \$4,500.

Q. When you left that work at the Chititu store, when you quit spending all your time at the Chititu store, which was about August or September, 1910—how much was due then for wages or salary?

A. Probably \$4,000.

Q. Then you had received practically nothing during those three years?

A. No, practically nothing.

Q. You had been working for your board, as far as receiving anything was concerned?

A. That's the fact, yes.

Q. Didn't you state a minute ago that your personal expenses would be about \$500 or \$600 a year?

A. No, I don't think I did.

Q. You had about \$4,000 coming? A. Yes, sir.

Q. Now, you were working for Al when you worked in the logging-camp and built the roadhouse at Blackburn? A. Yes, sir.

Q. You had no interest in that?

A. No, sir. [66—49]

(Testimony of H. M. Fagerberg.)

Q. And when you accepted a reduction in salary to \$100 per month in the spring of 1912, you were still working for Al? A. Yes, sir.

Q. When you were working at the Chititu store from 1907 to 1910, your understanding was that you were working for J. A. Fagerberg and Thomas Carstens?

A. Practically, as I understood the conditions between Al and Thomas Carstens.

Q. And for whom were you working when you quit the Chititu store and went out to the logging-camp—were you still working for Thomas Carstens?

A. Practically, under the same agreement in force.

Q. And during all of 1911 then, when you were working on the construction of the Blackburn road-house and in the fall of that year, including 1912 when you freighted on the trail, you considered that you were still working for Thomas Carstens?

A. I certainly did.

Q. You understood that there was a sort of general partnership between J. A. Fagerberg and Thomas Carstens in the business that J. A. Fagerberg was doing in the Nizina country?

A. Something to that effect, yes, sir. The way I understood it, at the time the Carstens Packing Company held a bill against the old Nizina Trading Company and at the instigation of the Carstens Packing Company this was turned over to Al—that is my understanding of it; that was the way it was explained to me.

Q. And you were still working for J. A. Fagerberg

(Testimony of H. M. Fagerberg.)

and Thomas Carstens, or the Carstens Packing Company, as the case may be?

A. As the case may be, yes, sir; I don't know how the situation stood exactly; that is the way it was explained to me at the time.

Q. At what time? Until what time? [67—50]

A. Until 1913.

Q. Until you got this bill of sale? A. Yes, sir.

Q. The latter part of the summer of 1913?

A. Yes, sir.

Q. And your understanding was that you were working for Thomas Carstens in the freighting?

A. Yes, sir.

Q. And in the roadhouse? A. Yes, sir.

Q. And in the construction of the roadhouse?

A. Yes, sir.

Q. Did you see Mr. Carstens when you were in Seattle in 1909? A. I did not, no, sir.

Q. Did you hunt him up?

A. No, sir; I did not.

Q. Did you have any correspondence with Mr. Carstens or the Carstens Packing Company about your work up there? A. I never did.

Q. At the time you quit working at the Chititu store and when getting out logs for the Blackburn roadhouse, your idea was that Mr. Carstens was to be interested in the Blackburn roadhouse?

A. The same principle would apply there; in fact I demanded my money in 1910, before I went over there, and, as I explained before, I agreed to stay by the proposition with them—my wages were still in the business.

(Testimony of H. M. Fagerberg.)

Q. At that time you had about \$3,800 in your possession? A. I had that, yes, sir.

Q. Which you could have held out under your contract? [68—51]

A. Which I could have held out under my contract and stuck it into my pocket.

Q. And instead of that, in order to help along the business, you staid right with it, and allowed Al Fagerberg to use it? A. Yes, sir.

Q. And you never went to see Mr. Carstens or said anything to him about it? A. I never did.

Q. You got uneasy about your money?

A. I got uneasy about my money, yes.

Q. Did it ever occur to you to write Mr. Carstens to ask him how far he was backing Al in the business he was doing?

A. It never occurred to me, never thought of it.

Q. At the request of Al, you left the \$3,800, which was in your possession and which you could have retained, if it was due and owing to you, you left it at his request and went working for him and did work for him for nearly a year in the construction of the roadhouse and still had \$4,000 due you—didn't you consider it worth while to ask Mr. Carstens, write him and ask him if he was interested in the roadhouse?

A. It didn't strike me that way, no sir.

Q. You have stated there was \$4,000 due you?

A. Al was handling that and they could talk that over themselves; I might have gone further with Al than I would with anyone else, naturally would.

Q. But you became quite dissatisfied, according to

(Testimony of H. M. Fagerberg.)

your own statement, in the spring of 1912—so much so that you and your brother had a serious disagreement? A. Yes, sir.

Q. But you continued to work for Fagerberg and Carstens for more [69—52] than a year after that without ever writing to Mr. Carstens and asking him whether he was back of it?

A. Why, no, of course I didn't; it never entered my mind. I understood the proposition and Al was handling that end of it for him. They never took the trouble to consider me; I was dealing with Al and he was representing them.

Q. When did you quit working for Al Fagerberg and Thomas Carstens?

A. When the deed was delivered over to me.

Q. When the deed was sent up by George Custer?

A. Yes, sir.

Q. Who mailed that to you? A. George Custer.

Q. He sent it to you? A. Yes, sir.

Q. And what did you do with it?

A. I put it on file and recorded it at Chitina.

Q. This is signed only by J. A. Fagerberg—you noticed that at the time? A. Yes, sir.

Q. And you sent it to Chitina to be recorded, did you? A. I did.

Q. This is already in evidence? A. Yes, sir.

Q. Did you ever notice this certificate on it when it was returned? A. Yes, sir.

Q. Filed for record by J. A. Fagerberg at 5 P. M. August 9, 1913—that was an error?

A. I suppose it was, on the part of Mr. d'Heirry.

Q. Did you write a letter to Mr. d'Heirry about it?

(Testimony of H. M. Fagerberg.)

A. Yes, I wrote a letter at the time. [70—53]

Q. Saying, enclosed you will find a deed for record, etc.? A. Yes, sir.

Q. How did you sign that letter, H. M. Fagerberg?

A. Yes, sir.

Q. And it was his mistake? A. Yes, sir.

Q. There is no chance that George Custer did that direct from Seattle?

A. There is no possible chance at all. I took the deed and showed it to Mr. Church and I delivered the power of attorney to Mr. Brock and it is still in his possession.

Q. Your business in the store was principally selling goods—I believe you testified you had almost exclusive charge of the store at Chititu?

A. At Chititu, I did, yes, sir.

Q. And what books of account did you keep?

A. We kept a day-book, slips of sale and transactions and a cash-book.

Q. A daybook and slips—did you make slips and enter them in the day-book in the evening?

A. No, sometimes I kept just slips; sometimes I had an old book I kept the sales in.

Q. And then you had a cash-book? A. Yes, sir.

Q. Did you keep any personal account with the company? A. To a certain extent, yes, sir.

Q. Have you a book in which from time to time, or each month, you entered up a charge from \$125 due on your salary and on the other side any goods you took out of the store?

A. No, sir; I didn't keep it that way. [71—54]

Q. You never kept any such record?

(Testimony of H. M. Fagerberg.)

A. No, sir; I believe there is one or two entries of that kind, that is all; my brother started it out that way for me. I am not a bookkeeper, and don't pretend to be, and I didn't keep it up.

Q. Had you ever had any experience in a store before? A. No, sir, never had.

Q. You had been mining and engaged in other business before that? A. Yes, sir.

Q. Are there any books which were kept in the store while you were in charge there here in the city, in possession of Mr. Dimond?

A. Yes, there is one.

Q. Just one book? A. Just one book.

Mr. RITCHIE.—We should like to have all books of record, showing the accounts of the Chititu store from 1907 to 1910.

Q. Now, how much was due you at the time you accepted this bill of sale in the summer of 1913? How much was due you on salary from J. A. Fagerberg and the Carstens Packing Company?

A. Practically \$5,600—under this last agreement, you understand.

Q. You had been drawing some money from time to time? A. Yes, for general expenses.

Q. Had you ever drawn any money and invested it in livestock? A. No, sir.

Q. Or in mining or any kind? A. No, sir.

Q. You owned no livestock up to the time you got this bill of sale from Al? A. No, sir.

Q. Did you own any personal property of any kind, besides your personal effects? [72—55]

A. No, sir.

(Testimony of H. M. Fagerberg.)

Q. Any mining tools, or sleds, or wagons, or dogs, or anything of that kind? A. No.

Q. From time to time when you were running the Chititu store, didn't you and your brother give grubstakes to various miners? A. Why, yes.

Q. That was part of the understanding possibly with Mr. Carstens that miners were to be grubstaked?

A. Yes, I believe they were, as far as that goes; I never had much to do with that part of it.

Q. You had no interest in those grubstakes?

A. No, sir.

Q. And never received any returns from any of them? A. No, sir.

Q. Now, in 1913, when you took over this property, what work were you employed in, after August, 1913, after this bill of sale, how did you occupy your time—in the fall of 1913 and *and* part of 1914?

Q. During the fall and summer of 1913—during the fall of 1913 I was taking care of the horses and I built a building alongside of this present building, a saloon for Breedman & Church, but I was looking after the horses in general; the road was tied up during that winter and I had to make a trip to Valdez here for horses, feed and one thing and another like that—general care of the horses and looking after the horse business.

Q. You didn't own any property of consequence then until this bill of sale was made in July, 1913?

A. No, sir.

Q. And that bill of sale was made to you to make

(Testimony of H. M. Fagerberg.)

you whole [73—56] on the back salary you had coming? A. Yes, sir.

Q. What were these freighting contracts that you worked on while you were working for your brother and as you assume for Carstens in 1911 and 1912? You stated that some of them were for the Kennecott Mines Company and some of them were carrying mail and some carrying supplies for Kernan and Esterly in Chititu Creek? A. Yes, sir.

Q. And probably for other mining operations?

A. Yes, sir.

Q. It was general freighting?

A. It was general freighting, yes, sir.

Q. And all those freighting contracts were taken by Al Fagerberg? A. Yes, sir.

Q. None by yourself? A. No, sir.

Q. You had no interest in it?

A. No; I might have taken a contract for Al. I knew the general run of the business and might have done that.

Q. When you had the difference with Al in 1912—where was that? A. At the Blackburn roadhouse.

Q. The principal cause of the row was Mrs. Damon, was it not?

A. No, sir; that is supposition.

Q. Now, in the summer of 1913, you knew that your brother J. A. Fagerberg, was having, as he had had for a year, difficulty with his wife, and she had sued him for divorce? A. I knew of it.

Q. What time did Al go out in 1913?

A. Along about the first part of November. [74—57]

(Testimony of H. M. Fagerberg.)

Q. Wasn't he out in the summer of 1913?

A. No, sir.

Q. Wasn't he in Seattle at the time the bill of sale was executed in July, 1913?

A. Yes, I beg your pardon on that—he went out in the fall of 1912; he was out during that time.

Q. He went out about the time or shortly after he made the lease to Oscar Breedman?

A. Yes, sir, that is the time he went out.

Q. And that lease is dated—

A. November, 1912.

Q. The lease is dated the 16th of November, 1912 and Al went out shortly after that?

A. Yes, sir.

Q. The possession of the roadhouse was given to Breedman at that time? A. Yes, sir.

Q. And afterwards Breedman and Church, if they were not in partnership at the time it was executed, they entered into a partnership shortly after?

A. Yes, sir.

Q. Did you have anything to do with the roadhouse that winter? A. No, sir.

Q. Now, the roadhouse was turned back in the spring of 1914? A. Yes, sir.

Q. That was just after Al came up from the outside? A. Yes, sir.

Q. While Al was out in the spring of 1913, did you know anything about what he was doing below by correspondence?

A. No, I did not; I wrote him two letters jacking him up about [75—58] it, as the time was drag-

(Testimony of H. M. Fagerberg.)

ging along; I was only supposed to stay there a month; he was supposed to have the thing straightened out by the first of the year but he didn't and it dragged along and I wrote several letters in regard to it, but he seemed to drag it along and didn't come through with his agreement with me until the first of July.

Q. There was talk between you, I believe you testified, about your having a settlement—he would go down and see the Carstens and try to get the thing straightened up? A. Yes, sir.

Q. Did he go down to see Mr. Carstens and see if he could get further credit and supplies?

A. Not that I know of; I didn't see why he should do it—he wasn't running the store.

Q. While you were running the store at Chititu, didn't you advertise as Fagerberg Brothers in the newspapers?

A. It was advertised as Fagerberg Brothers, yes, sir.

Q. There was an ad carried in the Valdez paper for two or three years or more as Fagerberg Brothers?

A. I don't know how long it was running—I saw the ad myself, yes.

Q. Who put that advertisement in, do you know?

A. I don't know who put it in.

Q. You never ordered it in?

A. I never ordered it in.

Q. Do you know who paid the bills for it?

A. I did not—No, I do not.

Q. Did you ever pay any?

(Testimony of H. M. Fagerberg.)

A. Not to my recollection.

Q. You never remitted to the Prospector Publishing Co. anything to pay for the ads in 1911 or 12 or along there? [76—59]

A. Not to my recollection, I did not.

Q. Do you know how long the ad remained in the paper? A. No.

Q. You don't know as a matter of fact that it remained there until the first of September, 1913?

A. No, I don't know that—I never paid any attention to it.

Q. You are not responsible for the ad being in the paper?

A. I am not responsible for the ad being in the paper.

Q. But you saw it? A. I saw it, yes, sir.

Q. Did you ask Al if he put it in?

A. It never occurred to me, never thought of it. The way that was, when I went into Chititu, the name of Carstens and Myers, they couldn't do business in there because their name was so damned rotten, and I was running the store there, between me and my brother—I was running it there and it naturally drifted into Fagerberg Brothers. We had a pretty fair reputation and were doing things on the square.

Q. And you don't know how the ad of Fagerberg Brothers got into the paper? A. No, I do not.

Q. And you have no recollection of ever remitting to the "Prospector" to pay for it?

A. I may have paid some bill—I don't recollect it.

(Testimony of H. M. Fagerberg.)

Q. When you were down here to see the dentist?

A. That was in 1908, I think it was—1909, in the spring of 1909.

Q. You are sure you didn't put the ad in the paper yourself? A. I never did, no, sir.

Q. Who paid the bills of the roadhouse, the ordinary expense bills—I mean the Chititu store?

[77—60]

A. The main bills were always paid by Al, my brother; sometimes a small bill, or anything like that, I would pay.

Q. Additions were made to the stock of the store from time to time? A. Yes, sir, they were.

Q. And where did you make those purchases usually? A. Most of them came from the outside.

Q. You know how they came in, don't you?

A. Yes, sir.

Q. You know from whom you bought? Wouldn't there be a tag or stamp on it showing whom they were from? A. Yes, sir.

Q. State some of the people from whom the Chititu store bought goods in 1908, 9 and 10, along there, when you were running the store?

A. Some were bought in the spring of 1908—some were bought from Blum here, a little.

Q. Whom did the bills for them come to—J. A. Fagerberg or Fagerberg Brothers?

A. I couldn't say, I don't know.

Q. You don't remember? A. No, sir.

Q. You had billheads printed Fagerberg Brothers?

(Testimony of H. M. Fagerberg.)

A. There were billheads printed Fagerberg Brothers, yes, sir.

Q. Didn't you use to sign the firm name to bills and receipts? A. I did at times, yes, I don't deny it.

Q. Why did you do that if you were not in partnership?

A. To protect the Carstens Packing Co. as well as myself, because as I stated before, it had naturally drifted into that—the papers had it as that and I signed it just because the heading was that way and I think I had a right to sign it that way because [78—61] every one, Mrs. Damon and Henderson, signed it the same way.

Q. Did you ever receive any request from the Carstens Packing Co. to protect them?

A. They admitted themselves and satisfied themselves that it couldn't be run in their own name and their own testimony shows it.

Q. When did they do that?

A. At the time it was turned over to Al.

Q. When you were running that in your own name, you ordered goods sometimes?

A. Very little ordering I done.

Q. Al did all the buying?

A. Yes, sir, Al did all the buying—I didn't have anything to do with it.

Q. You say the Carstens Packing Co. had a bad reputation in there? A. They certainly did.

Q. Didn't you take a long risk to work for Thomas Carstens for six years, if he had a bad reputation, without writing to him and asking him when he was

(Testimony of H. M. Fagerberg.)

going to pay you?

A. Perhaps I did, but at the time I went in there, I didn't know the people I was dealing with as I do now.

Q. You say they had a bad reputation at that time?

A. I was taking other peoples' word for that, I hadn't found it out; I have to be shown first and when I am shown, I know it.

Q. These are some of the letterheads that you used there (handing papers to witness)?

A. Yes, I guess they are, they have that appearance.

Q. There is a bunch of bills given to Jim Hall in the summer of 1911 for goods bought there and on each one of them is a receipt signed H. M. F. or H. M. Fagerberg—that is your handwriting? [79—62]

A. Some of them are and some are not.

Q. The signatures H. M. F. or H. M. Fagerberg are in your handwriting? A. Yes, sir.

Q. Look at them and see if some of them are not?

A. Here is one that is not; that is J. A.'s; this is Al's; two of them are my own, that I signed myself.

Mr. RITCHIE.—I would like to offer these in a bunch, but some are signed by Al.

Mr. DONOHOE.—We object to the introduction of the exhibit on the ground that none of the bills are receipted as Fagerberg Bros. The witness has admitted that there were billheads printed as Fagerberg Brothers, but these receipts are not signed Fagerberg Brothers and therefore do not tend in any

(Testimony of H. M. Fagerberg.)

manner to show the partnership, beyond what the witness has already admitted—that he did use billheads and had the heading on them as Fagerberg Brothers. These are all receipted by either J. A. or H. M. Fagerberg and in no case are they receipted Fagerberg Bros. We have no objection to the billheads. We admit they used such billheads and also billheads of the Nizina Trading Co.

By the WITNESS.—Those billheads did not come in until the spring of 1910.

Mr. DONOHUE.—Our objection is that they are incompetent, irrelevant and immaterial.

Objection overruled and exception allowed plaintiff.

The papers are marked Defendants' Exhibit 1* and admitted in evidence.

Q. You say you did not do any buying for the Chititu store? A. Nothing to speak of.

Q. Did you do any for the Blackburn roadhouse at any time?

A. Sometimes—along in the spring of 1911, I believe, I ordered a little at times there. As long as I was around the house [80—63] and was building the house, I ordered some.

Q. How would you order those, in whose name?

A. I don't recollect.

Q. Did you order anything in Fagerberg Brothers name? A. I might have, yes, sir.

Q. How did you order them, in the name of Fagerberg Bros., when you worked for Tom and J. A. when

*See Stipulation at page 437 of record.

(Testimony of H. M. Fagerberg.)

you worked for Tom Carstens and J. A. Fagerberg?

A. We used the firm name Fagerberg Bros. to keep the Carstens name out of it, that was the extent of it.

Q. Whose handwriting is that? (Handing witness letter.) A. My own.

Q. Is that your signature?

A. Yes, sir, I can explain the circumstances of that if you want it.

Mr. RITCHIE.—I wish to offer it in evidence. It is a lettter dated at Blackburn, Alaska, May 8, 1913, addressed to Schwabacher Bros. & Co. Ins., signed Fagerberg Bros. Per H. M. Fagerberg. We offer it in evidence as evidence of the partnership existing at that time between the two Fagerbergs.

Mr. DONOHOE.—We object to the introduction of the exhibit in evidence on the ground that it is incompetent, irrelevant and immaterial.

By the COURT.—There is a clearcut issue in this case raised by the pleadings as to whether or not they were partners and this is some evidence directed to that question. * * * It is a question for the jury here to determine whether or not J. A. Fagerberg and H. M. Fagerberg were partners and I think it is material on that question. It is admitted for the same reason as any other admission on the part of either one would be that they were in fact partners.

Plaintiff allowed an exception. Letter marked Defendants' Exhibit [81—64] 2 and admitted in evidence. Mr. Ritchie reads it to the jury as follows:

Defendants' Exhibit No. 2 [Letter].

Blackburn, Alaska, May 8, 1913.

Schwabacher Bros. & Co. Inc.

Gentlemen: Find Enclosed check for One hundred and Nine Dollars (\$109.00) as per your statement. Am sorry this account has been allowed to drag along as long as it has but I assure you that it is beyond me why it has not been settled before. Do not understand it at present time, but take it to be an oversight of Mr. J. A. Fagerberg in settling up acct. before his leaving for the states. Might also state that has been on the road since his arrival in Seattle. Thanks for your patience in the matter.

Respectfully,

(Signed) FAGERBERG BROS.

Pr. H. M. FAGERBERG.

Mr. DONOHOE.—He is entitled to explain that.

The WITNESS.—When Al went out in the fall of 1912, he left me in charge of the business, you might say; he didn't tell me the state of affairs or anything—he went off with the understanding that he was to settle up with me on the first of the year. During this time Schwabacher wrote me several letters in regard to this bill, they were getting rather mad about it and demanded a settlement of this bill. I took the matter up with them, as the thing explains itself—wanted an explanation of it and they wrote back several letters and we had quite a correspondence over the thing and I finally paid it myself to protect the business and if I signed it as Fagerberg Bros. per H. M. Fagerberg, it is immaterial—I

(Testimony of H. M. Fagerberg.)

didn't think of the legal point as having any bearing on it in any way—I didn't think of it at the time and it wasn't with any idea of partnership or anything else. I sent it that way as [82—65] I explained before, the business has been conducted as Fagerberg Brothers to protect the Carstens Packing Co. and used as a firm name in that respect only, and that is as far as I am responsible for that.

Q. Did you ever see that check before? (Handing witness check.) A. Yes, sir.

Q. Will you look at the signature on the back and see who made it, the endorsement? A. Yes, sir.

Q. Whose is that? A. It is my own.

Mr. RITCHIE.—We offer this in evidence for the same purpose, as an item of evidence, tending to show the existence of a partnership.

Mr. DONOHUE.—We object to the introduction of this in evidence because the check is made payable to Fagerberg Brothers and could not be cashed at the bank until endorsed Fagerberg Brothers.

Objection overruled and check admitted in evidence as Defendants' Exhibit #3. Plaintiff allowed an exception to the ruling.

Q. This check was given to you by me, was it not?

A. Yes, sir.

Q. You didn't ask me to change it and make it payable to H. M. Fagerberg or J. A. Fagerberg?

A. No, sir.

Q. This was given to you on account of the Victor Olsen account? A. Yes, sir.

Q. For goods which you sold to Victor Olsen on

(Testimony of H. M. Fagerberg.)

his wood contract? A. Yes, it was sold up there.

Q. And the billheads on which the statements of account against [83—66] Victor Olsen were made were the billheads of Fagerberg Bros.?

A. I couldn't say as to that, I don't know.

Q. You don't remember?

A. I don't know—I didn't make them out.

Mr. RITCHIE.—I will read the check to the Jury:
(Reading.)

Defendants' Exhibit No. 3 [Check].

Valdez, Alaska, July 25, 1912. No. 667.

S. Blum & Co., Bankers.

Pay to Fagerberg Bros. or order \$76.00,
seventy-six and No/100Dollars

E. E. RITCHIE.

Acct. V. Olson.

[Endorsed]: Fagerberg Bros. Per H. M. Fagerberg, member of firm.

Q. Did you have a book account in the name of Fagerberg Bros. in Valdez? A. No, sir.

Q. Did you have a bank account in the name of J. A. Fagerberg and H. M. Fagerberg?

A. Yes, I believe there was an account—I sent money to both accounts.

Q. Where was that account kept?

A. In the Valdez Bank & Mercantile Co.

Q. In what years?

A. Why, I think in the years 1908, 9 and 10—I am not positive as to that.

Q. What deposits did you make in that, what moneys? The moneys of the Chititu store?

(Testimony of H. M. Fagerberg.)

A. Yes, sir, the Chititu store.

Q. Was that a joint account of J. A. Fagerberg and H. M. Fagerberg or two separate accounts?

A. It was two separate accounts.

Q. You didn't keep a joint account of J. A. Fagerberg and H. M. Fagerberg? A. No, sir. [84—67]

Q. You are sure of that? A. I am sure of that.

Q. What moneys were deposited in these accounts? A. Moneys from the Chititu store.

Q. And did you deposit them all in one name or some in one and some in the other?

A. Some in one and some in another.

Q. And the moneys belonging to the Chititu store business were deposited in them? A. Yes, sir.

Q. And you are sure there never was a joint account?

A. Yes, sir, I am sure there never was a joint account.

Q. And you deposited sometimes in one account and sometimes in another and if in your name you would check it and if in his name, he would check it?

A. Yes; the reason I did that, I was short of change in there and I would check on that account to make the change.

Q. The use of the name of Fagerberg Brothers was solely a sort of arrangement of convenience?

A. As an arrangement of convenience, and it just naturally drifted into Fagerberg Brothers after I went in there and took charge of it; we didn't advertise it, as I say, at all; the first I knew about these billheads was when they came into Chititu.

(Testimony of H. M. Fagerberg.)

Q. You didn't order them yourself? A. No, sir.

Q. Do you know where they were printed?

A. No, sir.

Q. Did you have any letterheads printed Fagerberg Brothers?

A. Not any letterheads, no, sir.

Q. How did Blum & Co. make shipments to you to the Chititu store—you say you bought from them from time to time—did the shipments [85—68] come Fagerberg Brothers?

A. At the Chititu store, I couldn't say—the shipments from Blum there were not very extensive; I don't remember how they were shipped.

Q. In keeping up the business there, during the previous years, it was necessary to renew the stock with some kind of live stuff? A. Yes, sir.

Q. And there was considerable buying, from not only Blum, but outside houses? A. Yes, sir.

Q. And in the spring of 1914 there was a lot of shipments came in, were there not, to Blackburn and McCarthy, addressed to Fagerberg Brothers?

A. Not that I know of, no, sir.

Q. You never saw any? A. No, sir.

Q. How did the oats come in? There was a big shipment of oats from LaConnor shipped in there—how were they shipped?

A. J. A. Fagerberg & Company.

Q. Did you ever see any oats up at the roadhouse, on the Shushana trail, where there was some oats attached by the marshal—David's roadhouse?

A. I seen some oats there, yes.

(Testimony of H. M. Fagerberg.)

Q. How were they stamped?

A. I think J. A. Fagerberg & Company.

Q. You are sure they were not stamped Fagerberg Brothers?

A. I think not; I hauled them there and I don't know of it.

Q. In the spring of 1914 Al got back—about what time was it? A. In February.

Q. And then you took the roadhouse back from Breedman & Church [86—69] about the first of March?

A. Yes, sir, that was the time of taking it over.

Q. They had a stock of goods in there, mercantile goods? A. Yes, sir.

Q. And you bought them from Breedman & Church?

A. I don't know what arrangements they made at all—I was not there when he made the arrangements with them.

Q. You had nothing to do with that?

A. I had nothing to do with that.

Q. Did you or did you not give a promissory note signed Fagerberg Brothers, by H. M. Fagerberg, for those goods? A. Yes, I signed the note.

Q. The note was signed Fagerberg Brothers?

A. No, it was not, it was J. A. Fagerberg and I went good for it—Church asked me to.

Q. You didn't sign it Fagerberg Brothers?

A. No, sir—not that I wrote; I signed my own name.

Q. Has that note been paid? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. Have you the note in your possession?

A. No, I have not.

Q. Do you know where it can be obtained?

A. Yes, I think I can get it—I think it is at Blackburn.

Q. And the note is signed by J. A. Fagerberg and also by H. M. Fagerberg—each signed by himself?

A. Yes, sir, each signed by himself; that is the only way he would turn the goods over and I went and signed it, too; that is the way that was done.

Q. You made a deal then and at that time, according to this written contract, March, 1914, you owned everything that Al Fagerberg had owned up there—by that bill of sale—you owned the [87—70] Chititu store and the stock of goods there and the Blackburn roadhouse and the blacksmith-shop and the furniture and the stock of goods—or didn't you own the stock of goods?

A. No, I did not; I had nothing to do with them.

Q. Al took that over himself?

A. Al took that over himself.

Q. You owned the roadhouse and furniture?

A. I owned the roadhouse and furniture.

Q. Why did you make this lease to Al? (Referring to paper.) A. To protect myself.

Q. To protect yourself in what way—why didn't you run the road-house if it was so profitable?

A. If any man comes along and makes me a proposition of \$7,000, and I was to get it, I was willing to quit the country.

Q. What I am getting at is—you owned this road-

(Testimony of H. M. Fagerberg.)

house and everything in it and it was a very profitable business, and you owned the horses, and you figured out you could make good money—a good many hundred dollars per month from them—and yet you leased everything to Al Fagerberg and turned in and worked for him for \$100 per month according to this agreement? A. Yes, sir.

Q. Was that getting out of the country?

A. No, sir.

Q. Why did you do that?

A. In the first place what was only supposed to run for about a month before the incorporation was to be perfected and that was to be turned over to them; that was not to be run for any length of time; that was the understanding when I turned that over to him and they were to go ahead and carry this thing, in fact, my brother telegraphed for a man to Carstens and they [88—71] sent him up, but they didn't send the man he wanted; he was to get out and perfect the organization before I turned it over to him; I was to turn it over to him after the incorporation.

Q. Do you wish to be understood as testifying under oath, as you know you are, that this transfer of everything that Al Fagerberg owned in the District of Alaska in the summer of 1913, was not made to cover up this property and protect him against a decree for alimony in favor of his wife?

A. I don't know a thing about that; it don't concern me in the least—all I know is the agreement before he went out.

(Testimony of H. M. Fagerberg.)

Q. It wasn't the purpose to protect Al?

A. No, sir, not to my knowledge.

Q. You know at that time he was having trouble with his wife?

A. I certainly knew of it and that is the reason I was after him.

Q. And she had a decree of the Court against him for alimony?

A. I don't know anything about that; I don't recollect it.

Q. This transfer then was made at that particular time solely for the purpose of protecting you and liquidating the indebtedness due you from J. A. Fagerberg and Thomas Carstens?

A. That was the sole idea with me and if they came through with the money to me I had nothing to say, I was satisfied.

Q. You never had any information from Mr. Carstens about this proposed incorporation, did you?

A. No, sir; never did.

Q. Is George A. Custer any relation to you?

A. Yes, he is my brother-in-law.

Q. He is married to a sister to you and Al?

A. Yes, sir.

Q. Have you ever written anything to George Custer about your affairs and the large amount of money due you from Al and the Carstens Packing Company? **[89—72]**

A. No, sir, I never have, not to my knowledge---don't recollect of ever writing to him in regard to the business at all.

(Testimony of H. M. Fagerberg.)

Q. You worked for Al Fagerberg and the Carstens Packing Co., Thomas Carstens, for nearly six years, until they owed you a balance of nearly five thousand dollars, and you never wrote to Thomas Carstens and asked him for the money? A. No, sir, I never did.

Q. Mr. Custer is a lawyer, is he not?

A. Yes, sir, he is.

Q. And in active practice in Seattle?

A. Yes, sir.

Q. Al Fagerberg and Thomas Carstens—Al Fagerberg and Mrs. Damon ran the roadhouse from March until the attachment in August under that lease from you, did they not?

Mr. DONOHUE.—We object to that as not proper cross-examination and not based on any testimony and we object to the idea of bringing Mrs. Damon into this case as unfair and unprofessional.

By the COURT.—You may ask who ran the roadhouse under this agreement.

Q. Who ran the roadhouse from the first of March until the attachment about the first of August?

A. Al ran the roadhouse; that is, it was under his supervision.

Q. He had charge of it? A. He had charge of it.

Q. Now, you say that Rudolph Henderson assisted you in the packing? A. Yes, sir.

Q. Anyone else at any time?

A. No, sir; during freighting there was some other drivers.

Q. For whom was Rudolph Henderson working?

[90—73] A. Al Fagerberg and Carstens.

(Testimony of H. M. Fagerberg.)

Q. The same as yourself?

A. The same as myself.:

Q. You were both working as packers?

A. Yes, sir.

Q. Had no interest in the business and no authority except that you were in charge when you were away from him? A. Yes, sir.

Q. And had no interest in the contracts?

A. No, sir.

Q. You were using how many horses?

A. Ten on the start.

Q. How many of them belonged to you?

A. The bunch of them belonged to me,

Q. All of them belonged to you? A. Yes, sir.

Q. Two of those horses you had gotten from Al?

A. Yes, sir.

Q. He bought them two or three years before?

A. Yes, sir.

Q. And the other three you bought yourself?

A. Yes, sir.

Q. In what year? A. 1913.

Q. From whom?

A. From the Kennecott Mines Company and Brooks.

Q. How much did you pay for each one of them?

A. I paid to the Kennecott Mines Company \$285 for a team.

Q. You bought a team from the Kennecott Mines Company? A. Yes, sir. [91—74]

Q. And how much did you pay Brooks for the other horse?

(Testimony of H. M. Fagerberg.)

A. \$75. This was in the fall of the year, the fall of 1913.

Q. Do you know what Al paid for the two horses you had?

A. No, not for a positive fact, only what he told me.

Q. When did he buy them, if you know?

A. I think it was in the fall of 1910, I am not positive.

Q. He had had them for several years?

A. Yes, sir.

Q. Now, when did you first hear of this attachment—where were you when you first heard that Millsap had a writ of attachment?

A. When I got to McCarthy; I had been over at Chititu with pack horses.

Q. You went right back to Chititu immediately, did you not? A. Yes, sir.

Q. And demanded possession of the Chititu store, did you not?

A. I didn't demand it, no sir. I told Mrs. Cole that I was in possession of the store and it was mine; that Al had quit and I was in possession again.

Q. You didn't ask for possession?

A. I didn't ask for possession, no.

Q. And at that time the Blackburn roadhouse had not been attached? A. No, sir.

Q. That was attached several days later?

A. Yes, sir.

Q. What was attached when you got to Blackburn?

(Testimony of H. M. Fagerberg.)

A. The merchandise in the store, that is the first time; the second time, when I came back, it was the merchandise in the warehouse and several days later they came back and attached the whole thing.

Q. Where did the furniture come from that went into the Blackburn [92—75] roadhouse? Where was it bought?

A. Some of it was bought from the Compact Furniture Company, some Michigan outfit. It was knocked-down furniture when it came there, part of it, and part of it was gotten from the railroad company.

Q. From their camps?

A. From the commissary, yes; I don't know where they got it from.

Q. You didn't have anything to do with the buying?

A. No—well, I did buy some of it; I bought some from the railroad company, the time my brother wasn't there; he told me to watch out for any snaps and if I could pick up any snaps, to take it.

Q. And you bought some from time to time?

A. I bought some from time to time.

Q. You don't remember what you bought or what you paid for it?

A. No, it was in the nature of bedsteads and things like that, and chairs.

Q. And camp utensils and cooking utensils, perhaps? A. Yes.

Q. Any stoves? A. One stove, yes.

Q. You have no idea how much you paid for it?

(Testimony of H. M. Fagerberg.)

A. No, I don't recollect the circumstances.

Q. You bought it at low prices, the railroad going out of the business? A. Yes, sir.

Q. What was bought from the Michigan Furniture Co. if you remember? A. Just chairs.

Q. Beds? A. No, not that I know of. [93—76]

Q. Chairs and possibly desks?

A. Chairs and desks and tables.

Q. Any carpets?

A. No, there is no carpets from them.

Q. Any kitchen utensils? A. No.

Q. No bedding or bedsteads, you remember?

A. No, the bedding was bought from Blum, I think.

Q. Who ordered the stuff from Michigan?

A. Al did.

Q. Do you remember how it was shipped?

A. No, I don't remember the circumstances at all.

Q. Wasn't there quite a lot of shipments made to Fagerberg Bros. last year from outside houses?

A. Last year?

Q. A year ago—1914?

A. Not to my knowledge—I don't know.

Q. You had nothing to do with that?

A. I had nothing to do with that; I wasn't there when the shipments were made—I couldn't say; I was on the trail.

Q. You never ordered any yourself?

A. I never ordered any myself; if any shipments

(Testimony of H. M. Fagerberg.)

came, I knew nothing about it and had nothing to do with it.

Q. Do you know anything about any purchases from Schwabacher Brothers or Frye-Bruhn or the Richmond Paper Co.? A. No, sir, I do not.

Q. Do you know whether or not those shipments or any of them came to Blackburn stamped Fagerberg Brothers?

A. I couldn't say—I never paid any attention and never saw them.

Q. You filed a petition in bankruptcy against J. A. Fagerberg last [94—77] September in this court, I believe? A. Yes, sir.

Q. Among the allegations here (consulting paper), following the necessary allegations as to indebtedness and as to his occupation so as to qualify him for bankruptcy under the federal act is this statement, it is found near the bottom of the first page: That your petitioner is a creditor of said J. A. Fagerberg having provable claims against him which amount in the aggregate, in excess of security held by him, to five thousand one hundred eleven dollars and fifty cents; and that your petitioner is entitled to priority of payment of only a small part of his said claim, to wit, less than three hundred dollars within the meaning of section 64-b of the bankruptcy law of 1898, and that your petitioner has not received a preference within the meaning of sec. 60-a-b of such law as amended. Now, the \$300 of which you claim priority of payment and would be entitled to if you were a wage-earner, was the three months wages to which

(Testimony of H. M. Fagerberg.)

a wage-earner is entitled for the three months next preceding the petition of bankruptcy at \$100 per month? A. Yes, sir.

Q. If you were working for J. A. Fagerberg as you state you were entitled to \$300 priority?

A. Yes, sir.

Q. And that is the \$300 priority you speak of?

A. Yes, sir, that is the way I understand it.

Q. Now, what is the basis of the other \$4,800 of indebtedness—you say he owed you \$5,100?

A. From the rent of the roadhouse and the use of the horses.

Q. Since which time?

A. Since the fourth of March when he took possession. [95—78]

Q. There was no other basis for the claim? There wasn't any old indebtedness? A. No, sir.

Q. You leased the ten horses for \$2.00 a day apiece? A. \$2.50 if I recollect right.

Q. I think the contract says \$2.00. Yes, ten head of horses at \$2.00 per day; that would be \$20 per day for the ten horses or \$600 per month for the use of the horses.

By the COURT.—How many months were they charged?

Mr. DONOHOE.—Five months.

Q. I will read you your own statement and see whether it is correct: “Money due and owing deponent by bankrupt under an express contract of lease of Blackburn roadhouse, between March 1st and August 2d, 1914, at the agreed rental of \$200.00

(Testimony of H. M. Fagerberg.)

per month, and amounting to \$1,000.00; rental for Chititu store for same period at \$25.00 per month, \$125.00; hire for ten horses for same period at two dollars per day per horse, \$3,120.00; merchandise sold and delivered to bankrupt on March 1st, 1914, at his special instance and request, \$366.50." What was that merchandise that you sold to J. A. Fagerberg about the first of March?

A. It was hay and grain.

Q. And from the \$500 due for wages for five months, \$300 would be the amount of your priority? You didn't draw any money at all from the first of March to the first of August?

A. No, I didn't get a cent.

Q. There was no money drawn on the contracts?

A. No, sir.

Q. Were you engaged constantly in freighting from about March first to August 2d?

A. Freighting and packing, yes, sir. [96—79]

Q. Did you freight in to Chititu for Esterly?

A. No, sir.

Q. Did you freight in for Kernan? A. No, sir.

Q. For whom were you working?

A. To Chititu is the Nizina stock that went in there.

Q. You freighted in the Nizina stock?

A. Yes, sir.

Q. What stock is that?

A. That is the stock that went into the Nizina store.

Q. Where was that?

(Testimony of H. M. Fagerberg.)

A. That was from Carstens—Al was putting that in; I don't know anything about it; and then hauling oats along the trail, preparatory work for the summer's packing.

Q. There was a large shipment of oats came to J. A. Fagerberg? A. Yes, sir.

Q. What became of those oats? Where were they distributed?

A. Charley Davids at Shushana—various places along the trail.

Q. Were any of them sold? A. Yes, sir.

Q. To whom were some of them sold?

A. Some were sold to Mr. Hamshaw.

Q. What was your understanding as to the ownership of those oats? A. They belonged to Al.

Q. Not to Carstens and Fagerberg?

A. Well, I say Al—when I say that—

Q. You mean Al and Carstens, perhaps?

A. That is my understanding of it.

Q. Your understanding of it was that the Carstens had an interest in them?

A. I supposed they had. [97—80]

Q. You supposed they had?

A. They seemed to put up money for it.

Q. Where did you get the feed for the horses between March and August?

A. I don't know, what we started out on was feed I turned over to him myself

Q. Were they fed out of these oats brought up from LaConnor in the spring? A. Yes, sir.

Q. You fed the ten horses very largely out of

(Testimony of H. M. Fagerberg.)

them? A. Yes, I guess they were.

Q. Who else did you freight for that spring?

A. Why, just practically hauling in stuff for them in the Shushana, so far as the freighting went.

Q. Were you constantly employed?

A. Pretty much all the time, yes; you see after the freighting stopped, that is, the use of the horses, I went on the mail run to the Shushana; we started along in May.

Q. Carrying mail from McCarthy to Shushana?

A. From Charley Davids; my run was from Davids to Shushana; I was met there, Henderson carrying it to Dan Creek and Chititu and he met me at Davids and I carried it from there on into the Shushana.

Q. And when did that mail contract start?

A. The first of May as near as I can remember.

Q. How often did you carry the mail?

A. Twice a month.

Q. How long did it take you to make the round trip? A. About six days.

Q. And how many horses did you use?

A. First, I didn't use any horses at all, that is, only up to the [98—81] glacier; I used dogs—packed it on my back part of the ways and used dogs and horses, any way to get it there.

Q. How much freight do you think you carried altogether between the first of March and the first of August with those ten horses?

A. As to that time I couldn't say—the horses were

(Testimony of H. M. Fagerberg.)

busy all the time.

Q. Do you know how much Al Fagerberg was to receive on those contracts for the freighting you did?

A. No.

Q. You have no idea?

A. No—you see this is the way the proposition laid—Al was packing any time they had spare time; he would pack out oats or anything else along the trail in view of the idea of carrying the mail during the summer, to supply the horses during the summer and any time they were not working, he would start them in there.

Q. Do you think that you and Henderson and the horses brought in \$5,000 in freight between the first of March and the first of August?

A. Perhaps we didn't get it in cash—indirectly, if they went together, they would have made it and earned it.

Q. Do you think between the first of March and the first of August there was \$5,000 freighting done? That it would amount to that?

A. No, I don't think so, because it was preparatory work that had an influence on the future.

Q. You think the business was such that you could have gotten that \$5,100 that was due from Al from the first of March to the first of August?

A. If the business had been carried on. [99—82]

Q. If it had not been for this attachment, you would have gotten this \$5,100 in time?

A. I think perhaps I would, in time.

Q. There was no side agreement between you and

(Testimony of H. M. Fagerberg.)

A. That if you didn't earn it, you wouldn't get \$20 a day for the horses?

A. No, sir; in fact this contract is not supposed to run as long as it did at all; at one time I had an attachment made out, intended to attach the stock of goods myself, but I was talked out of it by my brother; the attachment was sworn to and everything by the commissioner up there.

Q. That was early in the summer?

A. That was early in the summer, yes, sir; I was out to do no one—I was out to do a square deal.

Whereupon Court adjourned until to-morrow (Tuesday) at 10 A. M.

Tuesday, May 11, 1915—Morning Session.

Continuation of the cross-examination of H. M. Fagerberg, by Mr. Ritchie.

Q. You stated yesterday, as is shown by the record here in the bankruptcy proceedings against J. A. Fagerberg, that you filed the petition in bankruptcy?

A. Yes, sir.

Q. Were you familiar at that time with the general indebtedness of J. A. Fagerberg?

A. Not to any great extent, no, sir.

Q. You didn't know just what creditors he owed?

A. No, I did not.

Q. Nor what amount? A. No.

Q. But you knew enough about it to know he was insolvent? A. Yes, sir. [100—83]

Q. You knew that from your relations with him and your inability to enforce your own claims against him? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. Have you ever seen the schedules in bankruptcy? A. Yes, sir.

Q. Do you know anything about the claim of the Carstens Packing Co. which is set up here as \$5,918.-32, merchandise and loan?

A. Only in a general way and what I have heard since.

Q. Did you receive at any time any of the goods involved in that \$5,900 claim?

A. Personally, you mean myself?

Q. Yes. A. No, sir, I did not.

Q. You and your brother together?

A. No, sir, I didn't have anything to do with that.

Q. Do you know when these goods were delivered and what was done with them?

A. Yes, I know when they were delivered—I helped haul them to Chititu.

Q. Were any of them used at Blackburn?

A. Not that I know of—I really don't know how the goods were distributed or where they came from; I didn't pay much attention to that; there were goods delivered there and some went to Chititu and some to Blackburn—I don't know, I didn't pay any attention to it.

Q. This indebtedness to Jennings Brothers, Mt. Vernon, Washington, \$1,014.50—that was for the oats, was it not? A. I imagine it was.

Q. You don't personally know?

A. No, sir, I don't personally know.

Q. Do you know anything of the claim of Schilling & Co. San [101—84] Francisco?

A. Just in a general way.

(Testimony of H. M. Fagerberg.)

Q. Or the Richmond Paper Company?

A. No, sir—I don't know anything about that.

Q. Or the Klock Produce Company?

A. No, sir, I don't know anything about that.

Q. You had nothing to do with the incurring of that indebtedness? A. No, sir.

Q. And you received none of the goods?

A. I received none of the goods, no.

Q. You stated yesterday that Rudolph Henderson was working for your brother, J. A. Fagerberg and not for you? A. Yes, sir.

Q. What information did you have about this proposed incorporation in the spring of 1914? Did you have any except what you received from Al?

A. That is all I had.

Q. You had no correspondence from anybody outside? A. No, sir.

Q. No information from George Custer?

A. No, sir.

Q. He wasn't involved in it in any way to your knowledge?

A. Not to my knowledge—not at that time anyway.

Q. At that time, when Al Fagerberg came up, about the first of March, or a little before perhaps, 1914, you were still working as you understood it under the old arrangement?

A. No, sir—before that I was working strictly for myself, before he came up—he didn't have nothing to do with the business at that time.

Q. You ceased to work under the old arrangement

(Testimony of H. M. Fagerberg.)

in the summer of 1913? [102—85]

A. When the deed was delivered to me I ceased to work under it—it was null and void, according to my understanding of it.

Q. That was in July or August, 1913?

A. That was July, 1913.

Q. From that time on you worked wholly for yourself?

A. From that time on I worked for myself.

Q. And your business was independent?

A. My business was independent and I considered it my own.

Q. You may state again what you were doing in the fall of 1913—in the winter of 1913 and 14?

A. I was getting out logs and done some freighting.

Q. On your own account?

A. On my own account.

Q. There was a sign on the station at Blackburn until recently, a large sign, Fagerberg Brothers, freighters?

A. No, there was no sign there—it just said See Fagerberg, Blackburn.

Q. It never said Fagerberg Brothers?

A. No, sir, it never said Fagerberg Brothers, never did at no time.

Q. What Fagerberg did that refer to?

A. Myself—I had that put up.

Q. At what time?

A. That was along in the fall of the year—if I recollect right it was along in December when I put that sign up.

(Testimony of H. M. Fagerberg.)

Q. What personal property, what property of all kinds did you own, about March, 1914, when this contract was drawn up by Frank Foster between your brother and yourself by which it was agreed that you were to get into this incorporation with the Carstens? You owned the Chititu store at that time? A. Yes, sir.

Q. Did you own any stock of goods in it? [103—86]

A. Just what old stock there was there.

Q. Just what they left there?

A. Just remnants of the old stock.

Q. That was some remnants of the old stock you took over in 1907? A. Yes, sir.

Q. Do you remember what the inventory of that stock was in 1907?

A. I do not know the exact, amount—I couldn't give you that off hand.

Q. There was an inventory made?

A. There was an inventory made.

Q. Do you remember the amount of that?

A. No, sir, I do not.

Q. Wasn't it about \$30,000?

A. I couldn't say, it might have been.

Q. It was approximately that?

A. Perhaps it was, I don't know—that is on the prices they were selling at at that time.

Q. That was Nizina prices?

A. That was Nizina prices.

Q. That is Nizina wholesale prices, cost and carriage of the goods, landed there? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. That is the way inventories are usually taken of store stocks? A. Yes, sir.

Q. About how much of that stock was remaining in 1913, when you took it over?

A. Why, there was practically hardware, some liquors and a little of everything, that was all of value—the hardware was about all of any value.
[104—87]

Q. Practically everything of value had been sold?

A. Yes, you might put it that way—sold or destroyed; it was worthless.

Q. It had been gutted so it was mostly remnants?

A. Yes, sir, it was mostly remnants.

Q. (By the Court.) How much liquor was there?

A. I couldn't say the exact value of the liquors—there was beer and whiskey and gin, a little variety of everything.

Q. Was there a license at one time granted?

A. There was a license—Wilson had a license, the Nizina Trading Company.

Q. What was the last year they had a license?

A. If I remember right it was 1904 or 5, I am not positive on that point, I wouldn't say about that.

Mr. DIMOND.—It was 1905.

By the COURT.—That was the last year of the license?

Mr. DIMOND.—Yes, sir.

Q. When you took over the stock in 1907, there were some liquors remaining?

A. Yes, sir, when I took over the stock in 1907 there were some liquors remaining.

(Testimony of H. M. Fagerberg.)

Q. Some unbroken cases perhaps or bottles?

A. Yes, sir.

Q. You owned the Chititu store and what goods were in it? A. Yes, sir.

Q. Was there anything else of value at Chititu?

A. There was the fixtures in the store, that was practically all.

Q. What was the store building and fixtures worth?

A. The building wasn't worth nothing.

Q. The fixtures had some value? [105—88]

A. The fixtures had some value.

Q. What was the stock and fixtures worth, \$2,000?

A. Well, it all depended upon conditions—sometimes an article is worth more than it is other times; take it at the time of the Shushana stampede, an article was worth money; it all depends on conditions, you know how it is in a mining camp.

Q. Under ordinary and normal conditions, as they have been the last few years, barring the Shushana strike, was there two or three thousand dollars worth of fixtures and goods there?

A. I should say there would be between two and three thousand—that is, according to the prices prevailing there.

Q. The property, the building, at Blackburn, you fix the value of that at \$3,000? A. Yes, sir.

Q. And the furniture \$2,000? A. Yes, sir.

Q. And the blacksmith-shop and outbuilding about \$200 or \$250, and the barn \$500 that makes \$5,000 or a little over for the buildings and equipment?

(Testimony of H. M. Fagerberg.)

A. Yes, sir.

Q. And you had horses of what value?

A. Myself?

Q. Yes.

A. I had ten head of horses at the time I turned it over to him, to my brother.

Q. And you had sleds and harness and wagons?

A. Yes, sir.

Q. What was the horses and general teaming equipment worth?

A. I figured the horses were worth \$200 at the time they were attached.

Q. That would be \$2,000? [106—89] A. Yes.

Q. And what was the other equipment worth that you used in freighting and teaming, sleds, harness and wagons?

A. Well, it would be worth about \$800, somewhere near \$800.

Q. That would be then approximately \$9,000 worth of property you had there in the spring of 1914? A. Close to it.

Q. A little over \$6,000 for the buildings and a little over \$3,000 for the horses and freighting outfit?

A. Yes, sir.

Q. You were going to put that into the incorporation if that deal had gone through? A. Yes, sir.

Q. And what was the arrangements as to the division of stock in that corporation?

A. I was to get 7000 shares, my brother ten thousand, as I understood it and Carstens was to have 20,000, 10,000 in consideration of their old stock,

(Testimony of H. M. Fagerberg.)

the way I understood it and 10,000 for merchandise and wares and one thing and another they were to put up, practically cash—you might call it cash.

Q. He was to be allowed ten thousand for the old Nizina stock?

A. He was to be allowed ten thousand for the old Nizina stock.

Q. And ten thousand more for new money and goods he was to put in?

A. Yes, that is my understanding of it.

Q. And Al was to get ten thousand?

A. Yes, sir.

Q. What property was to go into this incorporation besides the \$9,000 worth of personal property you put in and the few thousand dollars Carstens was to put in?

A. There was the Nizina roadhouse and store and practically everything I had in the country—that is practically what it amounted [107—90] to when it came to a showdown. I intended to clean up with this agreement in the fall—I was to get my \$7,000 out of the business and I was to have nothing left in the country; that included some claims I had in the Shushana, my interest in the mill, the Borger-Struck Mill Company, etc.

Q. What was that worth?

A. That was practically borrowed money I had and that was to be cleared up.

Q. What was the value of your mining property and the mill property, approximately?

A. The mill had about 150,000 feet of logs on hand.

(Testimony of H. M. Fagerberg.)

They cost about, in the water, \$11 per, thousand landed in the water.

Q. That would be then something over sixteen or seventeen hundred dollars?

A. Yes, and the value of the mill at that time, over \$2,000.

Q. Somewhere from 3,500 to \$4,000 in the mill and logs and lumber in the mill? A. Yes, sir.

Q. And your Shushana claims were wholly of speculative value?

A. Yes, my Shushana claims were of speculative value.

Q. You considered they had some value—they were fair prospects? A. Yes, sir.

Q. Then you had something like \$13,000. worth of property?

A. Practically—you might put it that way yes.

Q. And Carstens was to be allowed ten thousand for his old loan in the Nizina store? A. Yes, sir.

Q. And ten thousand for new property he was to put in—was he to put in the full ten thousand?

A. That was my understanding of it—that he was to put up \$10,000 cash. [108—91]

Q. What was Al to put in for his ten thousand?

A. I don't know—I left that to him, that was his own business and I didn't consider it, as long as the prospect suited me.

Q. The company was to be organized for \$37,000, and you were to put in \$13,000 of property and get \$7,000 out of it? A. Yes, sir.

Q. Mr. Carstens was to put in ten and get

(Testimony of H. M. Fagerberg.)

twenty? A. Yes.

Q. And Al was to put in his talent and get ten?

A. Yes, sir. When I put in this thirteen thousand, you want to know that there was some liabilities against this thing.

Q. How much were they?

A. Close on to \$3,000.

Q. Then the equity wasn't over \$10,000?

A. No, sir.

Q. And you were anxious to get out of the country and were willing to take \$7,000? A. Yes, sir.

Q. You had property then, personally, there worth \$13,000 with mortgages or other liabilities against it aggregating \$3,000. It was worth about ten?

A. Yes, sir.

Q. And you at that time made a lease to your brother which aggregated a return to you of \$925 per month? A. Yes, sir.

Q. Which would be \$11,100 per year?

A. Yes, sir.

Q. And you insist that no one but yourself had any interest in that? A. I certainly do. [109—92]

Q. And you leased that to your brother, property worth \$13,000, at a rate that was to bring you \$11,000 a year? A. Yes, you can put it that way.

Q. But you were willing to take \$7,000 for it and get out of the country? A. Yes, sir.

Q. There was no understanding at all, no secret agreement, between your brother and yourself that he really had an interest in that property but that it had to be carried in your name on account of his diffi-

(Testimony of H. M. Fagerberg.)

culties with his wife?

A. There certainly was not.

Q. There never was at any time? A. No, sir.

Q. Now, about that time, about March, 1914, when you were making these other arrangements, which I believe you testified were temporary, pending the final consummation of the incorporation deal, you made out a bill of sale to Thomas Carstens for the Chititu store, did you not?

A. Yes, there was one drawn up, but it was never consummated.

Q. You signed that and placed it in escrow?

A. Yes, sir.

Q. It was drawn up by Mr. Lattin, the agent?

A. It was drawn up by Mr. Wilt.

Q. And in whose hand was it placed in escrow?

A. Mr. Foster.

Q. Mr. Foster was to hold it? A. Yes, sir.

Q. And what was the object of that bill of sale?

A. They were trying to adjust their difficulties between Al and Carstens and Al had made me a proposition if I would turn that over to him, he would pay me \$500 cash for the layout and [110—93] the money was put up in the hands of Mrs. Damon and I knew it was good, for the Nizina store.

Q. That is the layout at Nizina?

A. The layout at Nizina—that was put up in cash—if we went through I would get the \$500 and they would get the store.

Q. And that fell through because Al and Wilt were unable— A. To arrive at an agreement.

(Testimony of H. M. Fagerberg.)

Q. So that was dropped? A. Yes, sir.

Q. And the sole consideration for that was, if the deal went through, you were to get \$500?

A. Yes, sir.

Q. Wasn't there the further consideration that Al Fagerberg was to be released of all liabilities he owed the Carstens?

A. I don't know anything about that.

Q. You were not interested in that at all?

A. I was not interested in that at all.

Q. You were only interested in getting your \$500?

A. I was only interested in getting my \$500.

Q. You used to keep the Blackburn roadhouse and run the store in connection with it and it was insured? A. I believe it was.

Q. Who took out the insurance?

A. If I am informed right, I think Blum took out the insurance.

Q. In order to cover their indebtedness?

A. Yes, sir.

Q. You were mortgaged to Blum most of the time?

A. Yes, sir.

Q. Did you ever have any correspondence with the insurance agent about it?

A. No, sir, not myself. [111—94]

Q. Who issued that insurance, what local agent—do you know who wrote it?

A. No, I am not familiar with the conditions of it at all.

Q. Did you ever see the insurance policies?

A. I never did.

(Testimony of H. M. Fagerberg.)

Q. Did you ever see any of the correspondence about it? A. I never did.

Q. Do you remember what years they were insured?

A. No, I do not, I am not acquainted with the facts of it at all.

Q. You never saw the policies?

A. No, sir, I never saw the policies.

Q. Do you remember that they were insured, the buildings were insured, in 1912?

A. I couldn't say as to that, I don't know.

Q. You don't know who is the custodian of the policy? A. No, sir.

Q. You never received any letter from A. J. Adams at Cordova about this?

A. No, sir, not to my recollection—I don't remember seeing anything about it.

Q. Did you ever see a letter reading like this—“Cordova, Alaska, June 12, 1914. Fagerberg Brothers, McCarthy, Gentlemen: On May 29th we sent you two policies covering your building at Blackburn in the sum of one thousand dollars each”—and then goes on to state that the San Francisco office had canceled one of the policies, the Westchester Company policy—you never got that letter from Mr. Adams?

A. No, sir, I never saw that letter.

Q. Did you mail the policy to Mr. Adams?

A. I don't know anything about it—I never had anything to do with it. [112—95]

Q. You know nothing whatever about the insur-

(Testimony of H. M. Fagerberg.)

ance? A. No, sir.

Q. You never had enough to do with the running of the Blackburn roadhouse to take any interest in that? A. No, sir.

Q. There seems to be some accounts kept in the front of this book and some at the back? (Mr. Ritchie refers to book later marked Defendant's Exhibit #4.) A. Yes, sir.

Q. What account did you keep in the front of the book?

A. This was a cash account, cash taken in and paid out; my brother started this in a bookkeeping form, but I never kept it up. I turned to the back here and just kept track of the actual cash taken in and sent to the different banks here.

Q. This is simply the remittances?

A. This is simply the remittances and the cash turned over to the banks and to J. A. Fagerberg.

Q. These are remittances sent down there; I see here H. M. Fagerberg by A. J. Dimond—you sent \$300. down by A. J. Dimond?

A. No, the check was made out by A. J. Dimond and that is just the form of the check.

Q. These are checks? A. Those are checks.

Q. That were issued to you?

A. Yes, sir.

Q. I see a check there by J. L. Galen to Fagerberg Brothers—that is the way Mr. Galen drew up the check?

A. Yes, sir, that is the way Mr. Galen drew the check.

(Testimony of H. M. Fagerberg.)

Q. Was that at your request?

A. Not at my request—he just mailed it to me.

[113—96]

Q. Here is a draft of Range—who is he?

A. Paul Range.

Q. One of them runs to Fagerberg Brothers; here is a check to Fagerberg Brothers by Frank Kernan?

A. Yes, sir.

Q. That was a common occurrence?

A. That was a common occurrence, yes, sir.

Q. Here is a check from Esterly to Fagerberg Brothers, \$272? A. Yes, sir.

Q. It was a very common thing for men to issue checks to you as Fagerberg Brothers?

A. Yes, sir.

Q. Why did they do that?

A. Why, the business was conducted in that way to a certain extent, that is, it was general knowledge or general supposition the business would be run that way. As I stated before, the business naturally drifted into Fagerberg Brothers; we went in there without any name and I was running the store and my brother coming in there once in a while, it was the Fagerberg boys this and the Fagerberg boys that and it naturally drifted into that proposition, but I never conducted it, that is flatfooted—that is where I made my mistake.

Q. When you made this deal in the spring of 1914, by which you were to get \$600 per month for the horses and other amounts for the roadhouse and other property you had there, which aggregated \$825

(Testimony of H. M. Fagerberg.)

per month, you then went to work for \$100 per month for Al. A. Yes, sir.

Q. I asked you yesterday whether you were pretty steadily occupied between March and August?

A. I was, yes, sir.

Q. Working nearly all the time? [114—97]

A. Yes, sir, sometimes night and day.

Q. And yet you did not, as I understand it, aggregate enough earnings to earn that \$900 per month?

A. I couldn't say as to that; I don't know; I wasn't conducting the business—I didn't have the financial end of it. I was on the trail working. I imagine in time it would work itself out so I would have got my money.

Q. Is it a usual thing for horses to be worth that much in that *counright* along for five months, from March to August?

A. At that time of the year, yes.

Q. You had been freighting for a good many years there? A. Yes, sir.

Q. Had you been in the habit of making \$600 per month over and above expenses out of freighting year after year?

A. As to profits I couldn't say, but I know this, the horses have been rented out at different times and employed steadily. I can recite one instance, and perhaps this check you have in your possession will come up on that same proposition later on, that at the time I came here and you gave me this check here, I was after horses then; we were short of horses; that was in 1912; we had to have 19 horses;

(Testimony of H. M. Fagerberg.)

there were eleven horses on hand and I came to Valdez to get the balance; all those horses were hired out at \$3.00 per day and they were employed from that time until late in the fall and employed all summer, long before that, when we started in at Kenne-cott. This business was just gradually worked up and the money was reinvested in the business and went on—that is my understanding of it; it didn't jump into existence all at once.

Q. What I am getting at is this—I think all of us know there are times when horses and freighting bring big money, but I want [115—98] to know how much of the year they bring so much money—aren't there times of the year when a horse eats his head off?

A. There is, yes, I admit that—that is why I went into the milling business.

Q. Is freighting good steadily from March to August every year?

A. Practically, yes—the—the best part of it is at that time and from then on until the fall.

Q. I am trying to get at the amount of your profits; you were able to lease all of his property which is supposed to bring you \$825 per month, including these ten horses at \$600 per month and out of that your brother would expect to make some profit?

A. Naturally would, I suppose.

Q. If the freighting business is so profitable up there, how does it happen that you haven't anything more to show for all these years you have been working up there?

(Testimony of H. M. Fagerberg.)

A. As I say, this business is worked up. Put it this way, the business is getting to a point—we put in many years to work up that business to that point—it is getting to be where it is worth some money and capable of offering some money through the efforts of the past—that is sifting it down to a fine point. You can realize yourself that any business on the start has to be worked up to a certain point, before it is capable to earn that money.

Q. How is Blackburn now, isn't the town pretty near abandoned?

A. Yes, it is, through politics and one thing and another.

Q. The roadhouse has very little value now on account of the business having gone to McCarthy, two miles away?

A. To a certain extent. yes—the Carstens is the fall guy on that.

Q. When did that begin to transpire?

A. Of course, after the roadhouse was closed up there, why it naturally [116—99] drifted down, that is one reason. There are two towns there; I am going into politics now.

Q. I want you to tell just the conditions up there.

A. There is a faction at McCarthy that is doing everything in their power to kill the Blackburn place. They realize that if this deal made by my brother was consummated that it was going to be a bad thing for the McCarthy place. They done everything in their power to knock the deal with my brother and the Carstens Packing Company and the Carstens

(Testimony of H. M. Fagerberg.)

Packing Co. got scared and tried to make my brother the goat and tried to make me the goat; they wouldn't stay back of their agreement with him; that is the fine point, when you get into politics, what is back of this thing all the way through; and they sent another man up there by the name of Brown to represent them; he was mislead by the other bunch below and misinformed and hoodooed and everything else and they stirred up enmity between my brother and him and he goes to the Carstens and tells Mr. Carstens the state of affairs and Carstens gets scared and falls back on the whole proposition.

Q. Do you know what the agreement was between your brother and Mr. Carstens except on Al's statement? A. Just on Al's statement.

Q. You had no other knowledge of it?

A. I have no other knowledge of it.

Q. There has been rivalry between those two towns for a couple of years?

A. There certainly has to a certain extent.

Q. And the business has been drifting from Blackburn to McCarthy—which is the end of the railroad—for at least two years?

A. It didn't drift as long as the Blackburn road-house was running. [117—100]

Q. Blackburn was getting to be a pretty slow place last summer?

A. No, it was fairly good—it was getting its share of the business.

Q. Hasn't nearly all the business gone away from there?

(Testimony of H. M. Fagerberg.)

A. It has, since the roadhouse was knocked by the other gang—they accomplished their point.

Q. Wasn't it going away before that?

A. No, it was not.

Q. Weren't people moving from Blackburn down to McCarthy to a certain extent?

A. To a certain extent, some of them were, but the main business was conducted there.

Q. Did you see C. F. Wilt when he was up there last summer? A. I saw him, yes, sir.

Q. Did you talk to him?

A. Not to any great extent, I had a few words with him, that is all.

Q. Were you present at any negotiations between Al and Wilt?

A. I just heard part of it, I didn't pay much attention to it and he didn't pay much attention to me.

Q. You were considerably interested, as your property was to be transferred in the deal?

A. To a certain extent, yes.

Q. But you had very little to do with the business?

A. I didn't have nothing to do with it; if I went to them, they would say, "Go to Al," that is the situation, that is the satisfaction I would get out of them—he was looking after their end of it.

Q. Who said that, Wilt?

A. Practically—he practically told me that I was dealing with Carstens through Al, he was the man representing them—that [118—101] was my understanding of it, and if I went to them, he would say, "Go to Al, he is handling that end."

(Testimony of H. M. Fagerberg.)

Q. Is this statement correct? (Reading.) After a description of the negotiations—Fagerberg Brothers finally agreed to make a bill of sale to Thomas Carstens for the Nizina store and all the old original goods that were still left in the store and they agreed to pay the Carstens Packing Co. the amount that had been shipped to them in the spring of 1914—is that correct? A. Does that include me?

MR. DONOHOE.—What are you reading from?

MR. RITCHIE.—I am reading from some information given me—I am simply reading the question.

By the COURT:—If you want to use the paper, you can refresh your recollection by reference to the paper—you can ask him if certain things are so.

MR. RITCHIE.—This is not the foundation for any impeachment at all—I am seeking for information.

By the COURT.— I think the form of the question is objectionable.

MR. RITCHIE.—This is a general statement in writing by Mr. C. F. Wilt of his recollection of the transactions that took place last summer and I am founding my questions on the information he gave me; there is no intention of using it for impeachment because Mr. Fagerberg has never seen it—I am simply framing the questions on this information.

Q. Was there an agreement made by your two brothers to make a bill of sale to Thomas Carstens for the Nizina store and all the other goods that remained in it and that the consideration for this bill

(Testimony of H. M. Fagerberg.)

of sale was that Mr. Carstens would relieve you of all liabilities for the old debt owing on account of the Nizina store? [119—102]

A. All I know about that, Al came to me and said if I would turn that over to them, he would give me \$500 and I said, "All right, I will take \$500 for it and give them a bill of sale"; that is all I know about the affair and that proposition was put up to Foster, if I got the \$500 that settled it with me—I didn't care about the details at all.

Q. After the bill of sale was drawn and placed in escrow, was there anything said by you or by Al, in your presence, in the way of a promise to pay him every cent for the last bill of goods sent up there by Carstens?

A. No, sir, I never saw Wilt since; that morning I went away to Chititu and the time I came back he was gone—I never saw him since and don't know anything about it.

Q. Did you state, or were you present when Al stated, if he did, or was any statement made by either of you, that you had \$1,200 coming from the Shushana in a few days and you would apply that on account of the bill coming up?

A. No, I don't know anything about that.

Q. You made no such statement?

A. I made no such statement and don't know anything about it.

Q. As to the profits you could have made up there—I believe you stated you got \$4.00 a day, a dollar a day for a room and a dollar for meals and 75¢ for a

(Testimony of H. M. Fagerberg.)

bunk? A. Yes, sir.

Q. And possibly half of that and perhaps a little more is profit?

A. If I recollect I said \$1.50 is profit.

Q. You said first \$2.50 and then modified it to \$2.00 as I remember, but you have a right to change that if you wish, but would say the profit was \$1.50 a day anyway?

A. It was that anyway, that is a fair average of it. [120—103]

Q. What was the travel through there the year before? A. The travel was good.

Q. That was right after the Shushana rush?

A. Yes, sir. Church claims he cleaned up \$10,000 on the proposition while he was running it.

Q. There wasn't near as much travel last fall as there was the fall before, was there?

A. No, not as much—there was a stampede on then.

Q. How many people do you suppose came out of the Shushana and stopped at Blackburn and McCarthy between August and November, 1914—Can you form any estimate how many people came out, past Blackburn and McCarthy?

A. As to that I couldn't say—there must have been in the neighborhood, from the surrounding country, from six to 800 people.

Q. Where did these men usually stop? Don't a great many of them just siwash it, as is said, or do they nearly all stop at roadhouses?

A. Most of them last fall stopped at roadhouses.

(Testimony of H. M. Fagerberg.)

Q. A great many of them come in there and just take the train, without stopping?

A. Sometimes, if they happen to connect; they stay over night, they never get through in time to take a train right out.

Q. Your estimate of \$1.50 or \$2.00, whichever it is, you made on each guest, doesn't that depend a good deal on the number? A. To a certain extent.

Q. The expense of running the roadhouse is the same? A. Yes, sir.

Q. So if there is only one guest, there is no profit at all? A. Not as much, no.

Q. And if there were fifteen or twenty guests, there would be a big profit? [121—104]

A. Yes, sir.

Q. Your estimate of \$1.50 or \$2.00 profit is where there is a very considerable number of guests?

A. To a certain extent.

Q. What was the cost to you of a meal up there, aside from the labor bestowed on it?

A. Well, the meal would cost on the average besides— You mean without the labor?

Q. What would the goods cost, the grub itself up there—the freight is heavy up there?

A. Quite heavy, yes, sir.

Q. What is the cost of ham and eggs, for instance?

A. Thirty-five cents, about 35 cents.

Q. And with other things that go with it, a meal costs perhaps 40 to 50¢?

A. Perhaps, something like that, on the average.

Q. And if you serve a large number of them, there

(Testimony of H. M. Fagerberg.)

is a good profit? A. Yes, sir.

Q. If you serve only one or two, your salaries are going on just the same? A. Yes, sir.

Q. And the profit depends absolutely upon there being a considerable number of guests in the house?

A. It does, to a certain extent.

Q. Just tell us again what you figure you could have made out of the horses from August to November?

A. I figure I could have cleared \$300 a month on the horses, easy.

Q. Just at different kinds of freighting?

A. Just at different kinds of freighting.

Q. And if you were working for Al at \$100 you wouldn't get anything [122—105] more—you would simply get \$100 per month whether he made anything or not?

A. What have you reference to?

Q. You say you have lost a large amount of money because of loss of profits on account of this attachment. At the time the attachment was made, you were working for \$100 per month, were you not?

A. Why, at the time the first attachment was made, I was working at \$100 per month, but at the time the attachment was made on the roadhouse, I was in possession of the roadhouse myself and conducting it. Al had given up possession and threw up his deal with me.

Q. If there had never been any attachment, you would have gone on working for \$100 per month?

A. Yes, sir.

(Testimony of H. M. Fagerberg.)

Q. And that would have been the extent of your profit? A. Yes, sir.

Q. You would have worked for \$100 per month for the next three months? A. Yes, sir.

Q. So all you lost from August to November was \$100 per month by reason of the attachment?

A. And the value of the horses, the rent of the horses.

Q. But what you lost personally, by your own services, was a chance to work for \$100?

A. Putting it on a personal basis, yes, sir.

Q. And you consider you lost \$2.00 a day on each horse? A. Yes, sir.

Q. What were your sales the first year you were in that business up there at Chititu, the first year you were working there? A. The actual cash sales?

[123—106]

Q. Yes.

A. Well, it was close on to—from September first until January first, 1908, as near as I can recollect, it was in the neighborhood of \$1,800, cash sales.

Q. And what were the sales during the year 1908?

A. Why, something like \$2,800.

MR. DONOHOE.—He can look at the cash-book to refresh his memory?

By the COURT.—Yes.

MR. RITCHIE.—I want to know the exact facts as near as we can get them. I believe we will ask to have that book introduced as an exhibit.

By the COURT.—Very well, it may be received and marked Defendant's Exhibit Number 4. (It is so marked.)

(Testimony of H. M. Fagerberg.)

The WITNESS.—This includes some furs he shipped out during this time too; I will have to do a little figuring here, but the cash sales—that includes the furs left on hand there by Mr. Wilson too—\$2,794.02.

Q. That was the entire cash receipts?

A. Yes, sir, and that includes the furs.

Q. Now how much in 1909? A. \$2,629.63.

Q. How much in 1910, when you closed the store?

A. \$4481.41.

Q. That would be a total of \$11,700.?

A. Yes, sir.

Q. At what profit did you sell those goods?

A. Well, we based the sales at Valdez prices and 15¢ a pound and freight added.

Q. At what profit over the inventory?

A. I didn't figure that, to be exact.

Q. About what percentage of advance over the inventory? [124—107]

A. About 25%—20% if I recollect right; that was the actual basis as it was figured out.

Q. About what were those furs sold for, as near as you can tell; there is a dispute between Mr. Donohoe and myself as to what you said about that \$1,800; I understood you to say you took in about \$1,800 including what you took in for furs left by Mr. Wilson?

A. No, there is \$2,794.02, that is in 1908—that includes the furs the value of the furs, of Wilson's—I have some here, personally, furs I got myself; this is the value of the furs Wilson left there—\$893.64 and

(Testimony of H. M. Fagerberg.)

the value of my own furs is \$123.

Q. How much did you sell for the Carstens, that is out of the Carstens stock—the furs left by Wilson belonged to Carstens, that was in stock?

A. Yes, sir.

Q. What did you sell between the first of September 1907, and the end of the year that belonged to the Carstens business, that is, the Nizina Trading Company business?

By the COURT.—It would be approximately \$2,000 would it not?

A. Practically that—a little less, about \$1,800.

By The COURT.—Between 18 and \$1900, then?

MR. RITCHIE.—Yes, sir.

Q. It would be between 1,500 and \$2,000?

A. Yes, sir.

Q. During the three years you were there you took in something like \$11,500? A. Yes, sir.

Q. Was any of that ever remitted to Carstens?

A. I couldn't say as to that, I don't know anything about it.

Q. It was all turned over to Al?

A. Yes—I don't believe it was, to tell you the truth; it was [125—108] reinvested in the business.

Q. It was all turned over to Al?

A. Yes, sir.

Q. Except the \$3,800 you had when you quit?

A. Yes, sir.

Q. And you ultimately turned that over to Al?

A. I ultimately turned that over to Al, but my

(Testimony of H. M. Fagerberg.)

understanding was—

Q. Go ahead.

A. My understanding was it was to be reinvested in the business.

Q. In all your business up there, Al did the financing?

A. Yes, sir—I didn't pay much attention to it.

Q. When you left Chititu in 1910 what was the value of the stock that was left—how much of it remained there?

A. I don't know as to that, I couldn't say the exact value of it.

Q. Was it pretty well gone at that time?

A. In certain lines it was and other lines it was not.

Q. There was considerable stock left even then?

A. Yes, sir.

Q. What has become of it since?

A. I don't know; part of it was sold and part of it is there yet and part of it got old and had to be chucked out. The only things of any real value, what you could say was salable stuff, was the flour and the milk, that is, the Eagle milk; the Carnation milk, you know the condition of that; after it is there a few years it freezes once or twice and spoils and sours. The fruit was all this old style—it was put up in the old style, in gunnysacks or canvas bags and you can imagine the condition of that when it has laid under canvas, under a canvas roof, etc.—and it wasn't a first-class article in the first place, and the same way with hams and bacon and lard

(Testimony of H. M. Fagerberg.)

and butter—you can imagine [126—109] the state of that after five or six years; the brine had practically run off the butter and you can imagine the state of that; a whole lot of the stuff was sold for dog feed.

Q. As I understand it, the inventory showed something like \$30,000 wholesale, and freight, in 1907?

A. Perhaps it did—I don't know that to be a fact, but I will admit that on the face of it.

Q. And you sold at a profit of 25% \$9,000 worth out of the inventory, leaving approximately \$20,000 worth of the inventory—now what became of that \$20,000 worth—did it appreciate or depreciate in value, was it wasted or was a large part of it sold?

A. As to that I couldn't say; as I said before, there is some of it left, some was sold for dog feed and some of it was thrown out in various ways.

Q. Your salary for the three years, from 1907 to 1910, was \$4,500? A. Practically, yes.

Q. And you sold \$11,500 worth of stuff, so that there is about \$7,000 besides your salary which you were holding at that time or had turned over, but while you were still holding the \$3,800 there was \$7,000 that you had turned over to Al from time to time? A. Yes, sir.

Q. And as far as you know, nothing was ever remitted outside?

A. Not as I know of; the money was reinvested in new stock and put into the business again. Take the first year, 1908 and 9, that money was put into new

(Testimony of H. M. Fagerberg.)

stock and went back into Chititu.

Q. And yet all this time the stock was largely depreciating? A. Largely depreciating, yes, sir.

Q. Now, is it not a fact that you started out as you say in 1907 [127—110] to work for a salary of \$1,500 a year and that you never got anything out of it but your board, but that all the money was being taken over by Al and used in ways you knew nothing about, and that he was investing in a great many other things, and was spreading out as a great many men do, trying to get ahead in this country, and you couldn't see that you were getting anything out of it but your board and you demanded an interest in the thing and you then became a partner instead of working for a salary?

A. No, I demanded my money at the end of 1910.

Q. And yet at the end of six years you turned everything over to him—from 1907 to 1913, when you got the bill of sale, you were working for your board—turned over all the money practically to Al, and yet had no interest in the business?

A. I had no interest in the business. I don't believe in lawsuits. The court is the last place I would go to if I had my say about it. Sometimes a man is forced to; when driven in a corner he has got to fight; and I went to him and tried to make a settlement at different times with him and demanded my money, but if I went through with it it would cause a worse spreading out than it has now, and I thought the best way as long as I was in it was to try to get along and get my money out of it in a satisfactory manner,

(Testimony of H. M. Fagerberg.)

where it wouldn't cripple every one and myself too, and I wouldn't get anything out of it or anyone else if it got into the court.

Q. You told me yesterday that in the fall of 1910 you had \$3,800 in your possesison and more than that was due you for wages? A. Yes, sir.

Q. But Al forced it out of you? A. Yes, sir.

Q. Do you wish to be understood as saying, when you had at least [128—111] that amount due as wages, you turned it over to Al who had never paid you anything but your board and went to work for him in the logging camp and building a roadhouse, still went to work for him and gave him back the \$3,800?

A. I looked at it in this light; he came at it in this way and perhaps you can understand things. He says, "I put you in here"—at the time we had a kind of rumpus—"You were broke," he says, "and I put you in here and gave you a chance to make this money, and now," he says, "when you have made this money and there is a chance to make money—this has been a losing proposition" he says to me—"you draw out, take your money," he says, "and leave me in the lurch with Carstens and the whole thing on my hands—you take your money and go off; when a man comes at you that way, what are you going to do?

Q. You knew most men would say, "If I am going to take a chance on the money, I want a share in the profits"—is that what you said?

A. No, sir, it certainly is not.

(Testimony of H. M. Fagerberg.)

Q. You stand then on your proposition, that at no time were you a partner of Al Fagerberg?

A. I certainly do.

Q. That you worked for him for six years, for him and some more or less visionary partner of his in Seattle, whom you never saw and never corresponded with?

A. Yes, sir.

Q. You never got any money out of either of them, but your board; he owes you \$3,800 which you gave back and you never had any business interest in the possible profits of this vast ramification of business that Al was trying to transact?

A. Not a bit; at that time I was aware of the Carstens Packing Co. [129—112] in 1910—and my brother will admit then I did not want to have nothing at all to do with the Carstens Packing Co. only on a wage proposition and I wouldn't go into business with them at all, under any consideration; if I knew they were in a concern I would get out, believe me, before they got a chance to hook me.

Q. That was your attitude toward them in 1910?

A. That was my attitude toward them in 1910.

Q. But you worked for them three years afterwards without wages?

A. Yes, I did, out of consideration for my brother—that was the facts of it.

Q. Now, you know nothing about this shipment of goods by Carstens in the spring of 1914, except that they were received there and you helped freight most of them into the Chititu?

A. That is all I know in fact about them.

(Testimony of H. M. Fagerberg.)

Q. Do you know what part of them went into the Blackburn store? A. I do not.

Mr. RITCHIE.—That will be all at this time.

Redirect Examination.

(By Mr. DIMOND.)

Q. Now, I think you have made a mistake, or I misunderstood you, concerning the amount you took in in the store at Chititu between 1907 and 1910. Do I understand you rightly that you took in \$1,800 from September, 1907, to January, 1908, January 1st, 1908?

A. To December 31, 1908, not January first, 1908.

Q. How much is that?

A. This includes the furs—it is \$2,794.02.

Q. That is between September 1, 1907, and December 31, 1908? A. Yes, sir.

Q. Between January 1, 1909, to December 31, 1909?
[130—113]

A. This is January first to September 9, 1909—\$2,629.63.

Q. Now, go from that date on to the fall of 1910?

A. \$4,481.41.

Q. Making a total of \$9,905.06 instead of \$11,500—where did you get that \$1,800 item from?

Mr. RITCHIE.—I see the point—the \$1,800 should be stricken out.

Q. Do you know how much of the stock of these goods was put in in 1908, approximately?

A. No, I do not.

Q. You don't know the amount of new stock put in in any year? A. No, sir.

(Testimony of H. M. Fagerberg.)

Q. But you did bring in new stock?

A. Yes, sir.

Q. Now, this inventory of \$30,000 made in 1907, upon which you seem to be very uncertain about—what did you base that inventory on, if you know?

A. It was just upon their prices, their selling prices at that time.

Q. Were the prices afterwards materially reduced, or reduced at all? A. Yes, sir.

Q. They were reduced about 50%, were they not?

A. About 33⅓, I think—that is what I figured on all the way through.

Q. About what part of this stock became worthless and had to be thrown away, do you know how much there was?

A. There was several cases of butter if I remember right, something like half a dozen cases of butter—the butter, lard, hams and bacon were practically all sold for dog feed and the Carnation milk was chucked out; there was corned beef and such as that that was thrown out; herring was thrown out. There is dried [131—114] fruit still in there yet, several hundred pounds yet. I think perhaps the whole bunch of dried fruit is there yet—it is wormy. There was graham flour; quite a bit of that was unsalable and sold for dog feed.

Q. You stated that the principal articles of value, practically the only articles of value, were flour and Eagle milk?

A. That is, that were salable—that you could sell.

Q. What about the hardware?

(Testimony of H. M. Fagerberg.)

A. There is no sale for that and practically all the hardware is there yet.

Q. Do you know what that hardware inventoried?

A. No, I couldn't give it offhand.

Q. You have no idea? A. No.

Q. What about those liquors—what would they inventory?

A. I forget the exact inventory of them.

Q. You have a very large quantity of liquors in there yet?

A. There is quite a bit in there yet, yes, sir.

Q. What became of the rest of it?

A. I gave a big lot of it away.

Q. You gave some to me?

A. Yes, I gave some to different people that came along; I would set out the bottle and give them a drink.

Q. In what condition was this butter?

A. Bad condition.

Q. Now, concerning these billheads—were the Fagerberg Brothers billheads the only ones you used? A. No.

Q. What else were used?

A. The old Nizina Trading Co. and other blanks and one thing and another like that. [132—115]

Q. Who made out the bill for the Victor Olsen account, do you recollect?

A. I believe my brother did; I had nothing to do with that.

Q. Now, why is it that you deposited money in the names of both yourself and your brother?

(Testimony of H. M. Fagerberg.)

A. I carried an account in my own name for the reason that I had to have something where I could make change. There was no cash in the country, it was practically all checks, when a man came in and paid his bill, I would make out his bill and make out my own check to cover the balance and that kept the cash in the country and was a convenient way of doing it; what I didn't need I put in my brother's name.

Q. Now, you had considerable difficulty with Al; he collected the money for six years and you never did anything as you have stated until 1913. How did you come to do business with him in 1914? You have stated at various times during the course of this examination that you worked for Al during all the years from 1907 to 1913 and never got your wages out of him. Now, with that fact in view, how did you come to trust him so far as to do any business with him at all in the spring of 1914? What did you have to go on? What was your reason for giving him a lease of all this property and taking the chances of not getting anything out of him?

A. When he came back in the spring of 1914 with this proposition of incorporation, I said—How do I know that you are representing the Carstens? You claim you are? “Well,” he says, “Harry, all I can say is this; I have nothing to show you, but I have a carload of oats down here that I have to pay \$1,500 on; if I draw a sight draft on them and that is accepted by them and goes through, will you believe that they are back of me then”; and I says, “Yes,”

(Testimony of H. M. Fagerberg.)

and he drew this draft and sent it out and [133—116] it went through and he got the carload of oats released and I naturally supposed it was a cinch.

Q. At the time you made this lease to him as you have testified, you expected that it would last only a short time?

A. I didn't expect it would last over two months at the very most.

Q. Why was it that this property that was worth about ten thousand dollars, why were you willing to sell for \$7,000?

A. I was willing because I wanted to go outside. I had a proposition from my father. He has considerable real estate around Seattle and he said if I could get a little cash money and come out there, he would back me outside and I wanted to get out and let Al and Carstens conduct it themselves.

Q. How long was this lease to run? I suppose the lease speaks for itself. This agreement you say began about the 4th day of March?

A. Yes, sir—it wasn't actually written up until the 23d day.

Q. The duration of this lease shall be six months—is that six months from the date of it or six months from the 4th day of March?

A. The 4th day of March.

Q. It was to terminate on the 4th day of September at all events? A. Yes, sir.

Q. Do you recollect what you paid for those horses that were attached? A. For one team I paid \$285.

(Testimony of H. M. Fagerberg.)

Q. When did you buy them?

A. That was in the fall of 1913.

Q. Are horses worth more or less in the fall than they are in the spring? A. Less. [134—117]

Q. Considerably less?

A. Considerably less, yes, sir.

Q. Were you around McCarthy very much in the spring of 1914 after you leased the property to Al?

A. I was not, no.

Q. Where were you?

A. I was on the Shushana trail most of the time.

Q. You were packing mail in there and freighting there? A. Yes, sir.

Q. You stated on cross-examination that it took you six days to make a round trip with the mail into the Shushana?

A. It takes a little longer than that.

Q. It takes about six days to go one way, doesn't it? A. Yes, sir, that is one way.

Q. That is what you meant? A. Yes, sir.

Q. You stated you put up a sign, See Fagerberg, something to that effect, in September—what year was that?

A. It was in the latter part of 1913 or the first part of 1914, I am not positive which; it was a freighting sign.

Q. Now, you have stated on your cross-examination to Mr. Ritchie that you calculate the store and the fixtures, and I think the stock was included in it, at Nizina, at \$2,000 and in spite of that, you agreed to take about \$500 for it when Mr. Wilt was up there;

(Testimony of H. M. Fagerberg.)

how do you account for such a great discrepancy between the real value and the amount you were willing to take?

A. Well, I didn't have much use for it and I was willing to take \$500. I thought I could use the \$500 to better advantage somewhere else than I could over there.

Q. This property was worth what you could get for it? [135—118]

A. Yes, sir, this property was worth what you could get for it.

Q. Not what you put into it? A. Yes, sir.

Q. You have spoken of the Borger-Struck mill and of an interest in it—what is your interest in that. A. A one-third interest.

Q. And some of these liabilities you mention are

Q. And some of these liabilities you mention are against that mill? A. Yes, sir.

Q. State whether or not there are any entries in that book, any charges made against J. A. Fagerberg for your wages? A. Yes, sir, there is.

Q. Read them.

A. February 20, 1908, H. M. Fagerberg Salary account \$95.95 and then it goes on further down May 20, 1908, H. M. Fagerberg Salary account \$233.35.

Q. Was that to apply on your salary of \$1,500?

A. Yes, sir, that was to apply on my salary of \$1,500.

Q. Are these the only items that appear?

A. Yes, sir, these are the only items that appear.

Q. Why didn't you continue to keep up those items?

(Testimony of H. M. Fagerberg.)

A. I wasn't very much of a bookkeeper and just let it slide. There wasn't much doing and I went at it in a different way, just kept the actual cash sales and transfered it through the bank and the check stubs.

Q. The defendant introduced in evidence here, Defendant's Exhibit Number 3; it is a check made out to Fagerberg Brothers and signed E. E. Ritchie and endorsed on the back Fagerberg Brothers by H. M. Fagerberg, member of firm—Will you state how that check came to be endorsed that way?
[136—119]

A. This check was handed to me by Mr. Ritchie here in Valdez one trip I made here for horses to go into the White River with a hunting party; I was after horses at the request of my brother. At the time I left there he gave me \$50 and he says, "Go out and get five horses to take this party in and don't come back without them and go anywhere you can get them"; and I went to Chitina and tried to get horses from Nafsted and couldn't get them and I came in here on this \$50 he gave me and I met Mr. Ritchie on the street here in Valdez and he says, "By the way, I have a little money here for you on the Victor Olsen account"; as near as I can recollect he says he had been having some business with Al on it; and I says, "All right, it will come in handy," and I went up to this office and he gave it to me—made it out Fagerberg Brothers. I went to the bank and handed it in to the cashier of the Blum Bank—I don't know the gentleman, never done business with

(Testimony of H. M. Fagerberg.)

the Blum Bank up to that time; and I endorsed it Fagerberg Brothers and he handed it back to me and he said, "Are you a member of the firm"? "Well," I says. "I don't know whether I am or not," but I says, "I will take a chance of signing it," and he says, "You had better sign it that way" and I endorsed it Per H. M. Fagerberg Member of firm, because I neded the money on my expenses going back. It was an account of Al Fagerberg, my brother; the money was used for roadhouse expenses, shoeing of horses at Chitina and the paying of the railroad fare for the horses from Chitina to McCarthy. Next morning I went on the road and never paid any more attention to it.

Q. Did he refuse to pay the money unless you did endorse it that way?

A. That is what he did he handed it back to me and asked me to endorse it that way. [137—120]

Recross-examination by Mr. RITCHIE.

Q. Who was the teller that paid you that check under those circumstances?

A. I didn't know the gentleman.

Q. Do you know whether he is in the bank now?

A. I couldn't say, I was not down there and don't know.

Q. Was it J. W. Gilson, or are you familiar with the bank now? A. No.

Q. You couldn't say?

A. I couldn't say, I don't know.

Q. That mill, you say you owned one-third of it; who owns the other two-thirds?

(Testimony of H. M. Fagerberg.)

A. Struck and Borger.

Q. When you bought these horses, what year was that, 1913? A. Yes.

Q. Where did you get the money to buy them?

A. Money I made myself since I got the business.

Q. After you got the bill of sale you held all the money? A. Yes, I held all the money.

Q. You testified yesterday that you understood all those years, from 1907 to 1913, that there was a partnership of some kind between your brother and the Carstens Packing Company? A. Yes, sir.

Q. And that the Carstens Packing Co. owned a half interest in the business?

A. To that effect; yes, sir.

Q. That was your understanding?

A. That was my understanding.

Q. Did you ever make an effort to get a bill of sale from the Carstens Packing Co. for half of it?

A. Me? [138—121]

Q. Yes—you took a bill of sale from Al for the whole of it; in the summer of 1913 you accepted and placed on file a deed or bill of sale for the whole of this property which Al Fagerberg said he owned in the District of Alaska; it was a bill of sale covering the whole of it, but you say you knew that the Carstens Packing Co. owned half of it—have you ever made an effort to get a bill of sale for that, for their half, or get from them an acknowledgment that Al Fagerberg was authorized to make it?

A. No, I have not; when this thing was turned over to Al, the whole thing was deeded over to him.

(Testimony of H. M. Fagerberg.)

As I understood the proposition, it had been turned over to him and he was representing them; they said, "Take it and do the best you can with it," and my understanding of the proposition between him and them was, that he was to split up half with them, if he could make it go—they relied upon him to pull them out of a bad mess and they turned the whole thing over to him. I was dealing with him. If I had gone to Carstens with any kind of a proposition at all, he would have referred me back to Al—Al was handling that end of the business—"You go and deal with Al," that is the answer I would have got from Mr. Carstens.

Q. Does your father live in Seattle? A. Yes.

Q. Has he lived there all these years?

A. For the last forty-five years.

Q. Did you ever write to him and ask him to see Thomas Carstens or the Carstens Packing Co. and find out where you stood with them?

A. No, I didn't bother my father about it, I attend to my own business—I don't bother my old father about it. [139—122]

Q. Although you knew that the Carstens Packing Co. had a half interest in this property, you didn't think it was necessary to get a bill of sale from them or any statement that Al Fagerberg had authority to make it? A. No, I did not.

Q. You took Al's word for it, as you did for everything?

A. Al's word and my understanding at the time of the conversation between Al and Mr. Myers on the

(Testimony of H. M. Fagerberg.)

boat and he showed me the bill of sale at that time.

Q. When did you get the interest in the sawmill?

A. In 1913—that is when we started in the business of the sawmill.

Q. What time of the year?

A. Along in the summer, that is when the mill was started up.

Q. In July? A. In July.

Q. What did you pay for the interest?

A. It was gradually worked up; the mill has practically paid for itself—it is paying for itself, it is not paid for yet.

Q. You didn't have to put up any money in advance?

A. No—I borrowed what money there was, I can show that.

Q. Now, you say that in 1910 the reputation of the Carstens people was very bad up in that country and as far as you knew you wouldn't trust them for anything—from what did you get that impression?

A. The surrounding country.

Q. Do you mean by something somebody had told you?

A. To a certain extent and their dealings in other ways; I was afraid of them.

Q. But you kept on working for them for several years afterwards?

A. To a certain extent; you can put it that way—it wasn't out of [140—123] consideration for the Carstens Packing Company.

Q. What particular things did the Carstens Pack-

(Testimony of H. M. Fagerberg.)

ing Company do to you that caused you to have such a bad opinion of them? A. Nothing particular.

Q. They had left a \$30,000 stock of goods up there in the custody of yourself and brother for three years and had not received a cent for them—is that what caused you to be so hostile to them?

A. No, not necessarily; it was their way of doing business I didn't like.

Q. You say you did the business with them wholly through your brother and never attempted to get into any communication with them directly?

A. No, but he got his instructions from the Carstens, believe me—he went out every fall.

Q. Do you know what those instructions were?

A. To a certain extent I do.

Q. From what?

A. Just by his conversation and by some letters that came up there later from Mr. Carstens.

Q. You have seen letters from Mr. Carstens?

A. I have, to him.

Q. Have you them in your possession?

A. No, I have not.

Q. Do you know whether Al has them?

A. He has some of them; they will come up later on.

Q. At the time this attachment was made and for a year or two beforehand, is it not true that around McCarthy and Blackburn, in that country, you were universally known as Fagerberg Brothers?

A. To a certain extent, yes. [141—124]

Q. And is it not a fact that your neighbors up

(Testimony of H. M. Fagerberg.)

there dealt with you as Fagerberg Brothers?

A. To a certain extent, yes; a good many of them, however, were aware of the fact how it stood, some of them.

Q. Wasn't it generally understood that Fagerberg Brothers owned the freighting business and road-house and were running it together?

A. Yes, that is the way it was understood.

Mr. RITCHIE.—That's all.

Witness excused. [142—125]

[Testimony of J. A. Fagerberg, for Plaintiff.]

J. A. FAGERBERG, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. Your name is J. A. Fagerberg? A. Yes, sir.

Q. You are commonly known in this vicinity as Al Fagerberg? A. Yes, sir.

Q. You were defendant in an action brought in this Court last July by the Carstens Packing Company, a corporation? A. Yes, sir.

Q. That is the action in which the writ of attachment was levied on the property involved in this controversy? A. Yes.

Q. Are you acquainted with Mr. Thomas Carstens? A. Yes, sir.

Q. He is president of the Carstens Packing Company? A. Yes, sir.

Q. How long have you known him?

A. Ten or twelve years; that is, personally and intimately acquainted with him for ten or twelve years—I have known him for the last thirty years.

(Testimony of J. A. Fagerberg.)

Q. And are you acquainted with Mr. Prater, the treasurer and secretary of the Carstens Packing Company? A. Yes, sir.

Q. How long have you known Mr. Prater?

A. About twelve years.

Q. Did you have any business relations with Mr. Prater in 1906?

A. Yes, Mr. Prater was a partner of mine in 1906.

Q. To what extent?

A. He had a half interest in a bunch of cattle I took to Fairbanks— [143—126] an interest, rather; he got a quarter of the profits and I got three-quarters.

Q. And that partnership was terminated when?

A. When I went out in the fall of 1906, sometime.

Q. Now, in 1907, did you have any business negotiations with Mr. Prater representing the Carstens Packing Company in regard to the store at Chititu, Alaska, known as the Nizina Trading Company store? A. Yes, I did.

Q. Just state the conversation had at that time?

A. Well, I came down to the office one morning—

Q. This conversation took place in the City of Seattle, at the office of the Carstens Packing Company?

A. Yes, sir. I came down to the office one morning and Bill said to me—that is Mr. Prater—“Where are you going this summer; better let me go in with you and go into Fairbanks.” I said, “I think I will go alone, take a small bunch of cattle and go into the copper country.” The railroad is

(Testimony of J. A. Fagerberg.)

building up there and I says, "There is a chance to do a meat business there and would rather go alone." He says, "By the way, you know Myers; well," he says, "He has got that old stock in there and they owe the firm six or seven thousand dollars and Wilson is going to quit and I would like to have you take hold of it and do something with it."

Q. What company or firm did he refer to?

A. The Nizina Trading Company owing five or six thousand dollars to the Carstens Packing Company.

Q. In response, what did you say?

A. I said, "I don't care to go in there myself, there aint enough in it for me, but I have a brother and will talk it over with him and if he wants to undertake it, why, I will help him with [144—127] it and see that it goes through all right."

Q. You had a business of your own?

A. Yes, sir.

Q. What was that business?

A. I was shipping cattle in the summer time up into the copper country and in the summer of 1906 into Fairbanks.

Q. Driving the cattle through the country and selling them where you could? A. Yes, sir.

Q. Did you again have a talk with Mr. Prater on this subject?

A. Yes, I had a talk with him afterwards, after I saw Harry and I told him Harry would take it, but I said, "I won't have anything to do with Tom Carstens or Myers on the proposition, but I will leave it to you and the Carstens Packing Company and

(Testimony of J. A. Fagerberg.)

I want a bill of sale for the old Nizina Trading Company stock and want full power to handle it as I wish and will do the best I can to get something out of it.”

Q. What was said in that conversation about the salary that H. M. Fagerberg was to have?

A. He said that the salary would be the same as he paid Wilson, \$1,500 a year.

Q. And after the salary was paid, if there were any profits, what was to become of those?

A. If we made anything out of the deal, for my part of looking after it, I was to get half and they were to get half.

Q. Who do you mean by they?

A. The Carstens Packing Company.

Q. Now, the night you were sailing from Seattle with your cargo of cattle, did Mr. Myers or the Nizina Trading Company deliver to you any paper on board the boat?

A. Yes, sir, that was just a little before I was starting to load [145—128] the cattle and after I got through, he came around and took me into the stateroom where Harry was and he delivered to me the bill of sale and I told him before Harry, “I am not responsible in any way for this old Nizina Trading Company stock but will do the best I possibly can with it.”

Q. You and Harry came up on that boat?

A. Yes, sir.

Q. And you landed your cattle where?

A. Valdez.

Q. And you took them in over the trail?

(Testimony of J. A. Fagerberg.)

A. Yes, sir.

Q. When you reached the Kotsina River, did you have any further negotiations at that point with your brother in regard to him taking charge of the Nizina store for you? A. Yes.

Q. State what that was?

A. When I got to the Kotsina, at Willow Creek, I began to find out I had too many cattle; I couldn't dispose of them all at Kennecott, and I figured on Gray taking some, but he had a shipment of his own and I had to back down; that is, I had to come back out of the country with the cattle, so I made arrangements with Harry to go in and take it over and gave him a letter to Wilson authorizing him to receive the stock and turn the thing over to him.

Q. What was your agreement with Harry Fagerberg at that time, if any, in regard to his wages?

A. I told Harry I would give him \$1,500 a year and "you do the best you can out of that old stock in there and keep out of trouble—don't get into any trouble with Esterly and Kernan and use your own name, but in any event you want to keep out of trouble." I [146—129] gave him his instructions and told him he would get \$150 per month in the summer and \$100 in the winter or \$1,500 a year and he could have what furs he could catch or anything that way.

Q. What did you say to him in case the profits or sales of the store did not amount to \$1,500—what would become of his wages?

A. If there wasn't any possible chance to get any-

(Testimony of J. A. Fagerberg.)

thing out of the store, I would guarantee his wages out of the cattle business—I would pay it out of my cattle business.

Q. You didn't go into the store at that time?

A. No sir.

Q. You were not there when the inventory was taken? A. No, sir.

Q. When after this last conversation you had with H. M. Fagerberg did you arrive at Chititu?

A. It was in the fore part of February, I think, in 1908.

Q. What was the occasion of your going there?

A. I simply went in there to see what the stock was and see what they had to have in there for the summer and take care of things, look after it.

Q. How long did you stay there?

A. I think I was there one day to rest up.

Q. And H. M. Fagerberg was then in charge of the stock? A. Yes, sir.

Q. Did you take in the year 1908, take any stock of new goods into the store, at your own expense?

A. Yes, sir.

Q. State the amount, if any, new stock of goods you added to the stock, the old stock, in the year 1908?

A. I took in about \$800 worth of stuff that I had taken from my own money, taken from Valdez, when I came out. [147—130]

Q. Did the Carstens Packing Company add any new stock that year? A. No, sir.

Q. In 1909 was there any new stock added to the old stock?

(Testimony of J. A. Fagerberg.)

A. Yes, I took in something like \$2,200, in that neighborhood.

Q. At whose expense? A. My own expense.

Q. Did the Carstens Packing Company add anything to the old stock there that year?

A. No, sir.

Q. In 1910 was there any new stock added?

A. Yes, sir.

Q. By whom and at whose expense?

A. At my expense.

Q. About how much?

A. About 35 or \$3,600, as near as I can recollect.

Q. Did the Carstens Packing Company or the Nizina Trading Company add any new stock that year? A. No, sir.

Q. Up to 1910, how much was the greatest amount of new stock added to the old stock at your own expense?

A. Between six and seven thousand dollars.

Q. Was Harry Fagerberg up to this time paid any part of his wages while there? A. No, sir.

Q. Did you pay him or allow him any wages out of the returns? A. No, sir, I did not.

Q. What became of the money that Harry Fagerberg received for the sale of goods there up to this time?

A. It was turned over to me to replenish the old stock. [148—131]

Q. And you put it back into stock?

A. Yes, sir.

Q. Did you each year during 1907, 1908, 1909 and

(Testimony of J. A. Fagerberg.)

1910 make trips to Seattle? A. Yes, sir.

Q. Did you from time to time have interviews with Mr. Prater and Tom Carstens, the officers of the Carstens Packing Company? A. Yes, sir.

Q. Did you make reports to them in regard to the affairs of the Chititu store? A. Yes, sir.

Q. Did you ever at any time since the transaction took place in 1907 have any other or different arrangement or arrangements with Thomas Carstens or the Nizina Trading Company or the Carstens Packing Company than the one to which you have testified? A. No, sir.

Q. In the summer of 1910 did you and H. M. Fagerberg at Chititu have some controversy or argument regarding the payment of wages due to H. M. Fagerberg?

MR. RITCHIE.—We object to that as leading

Q. Did you have any conversation about the wages due to H. M. Fagerberg in the summer of 1910?

A. It was the fall of 1910.

Q. In the fall of 1910? A. Yes, sir.

Q. State what that conversation was as near as you can recollect at this time?

A. I had been out along the Fairbanks trail and delivered my bunch of cattle there at the roadhouses and came back here and instead of going to Seattle—
[149—132]

Q. Tell the conversation without preliminaries?

A. The conversation was, when I met Harry at Mile 182 we had a genuine right to scrap.

Q. This was in the fall of 1910?

(Testimony of J. A. Fagerberg.)

A. This was in the fall of 1910. I told him what I was going to do, that I was going to put in the place at Kennecott and the Carstens Packing Company was in on it and Harry, said, "To hell with the Carstens Packing Company and you too! I have \$3,800 and you can go straight plumb to the devil."

Q. Why was he holding that \$3,800?

A. For his back pay.

Q. What was the final outcome in regard to that \$3,800?

A. The final outcome of it was, after I cooled down and had a good square meal, I talked him out of it and I told him I would put him in there and give him this chance; I had been stung with the proposition and when there is a chance there I will put it into the business and his money was all right, it was as good as getting out for himself and I talked him out of it, and he turned it over to me—I happened to be the stronger of the two on it.

Q. He turned it over to you? A. Yes, sir.

Q. That money you did use in the business?

A. Yes, sir, to replenish the stock from time to time at Chititu.

Q. Did you have any arrangements with Thomas Carstens or the Carstens Packing Company in regard to grubstaking any men with this stock of goods in there or going into mining ventures in that section of the country? A. Yes, sir.

Q. Explain that [150—133]

A. In the winter of 1909 and 1910 I wasn't getting my money back that I was putting into the new

(Testimony of J. A. Fagerberg.)

stock. I goes to Prater and kicks and he kinder shoved me over to Tom Carstens and I went over to see Tom at Tacoma and Tom said, "Al, for Heaven's sake, do anything you can with it, give it to prospectors or anything, turn it over so you will get rid of it." I told him the old stock was getting old and the tin was rusting, the butter was worthless, the dried fruit was wormy and I can't do anything with it and he says, "Do the best you can with it."

Q. And pursuant to that, did you grubstake some people with parts of this stock?

A. I have on various occasions.

Mr. RITCHIE.—When was that conversation?

A. That conversation was in the winter of 1909 and 10.

Q. And did you become interested in some mining ventures there? A. Yes, sir.

Q. And what interest did Tom Carstens and the Carstens Packing Co. have in them?

A. The Carstens Packing Co. was square even-up to the board with me and had half an interest in it—just as much interest as I did.

Q. Did these mining ventures that you became involved in there cost you considerable money in the way of doing development work or otherwise?

A. Yes, sir.

Q. State about how much money you have dropped on that—in development work?

A. On the Seattle Gulch property I spent \$1500 in one year and the Krumm property stands me in

(Testimony of J. A. Fagerberg.)

something like six or seven thousand dollars.

[151—134]

Q. This Krumm property is now known as the Telurium Mines Company? A. Yes, sir.

Q. How much do you estimate the total sum you dropped in connection with these properties?

A. Eight or nine thousand dollars.

Q. Where did you get that money?

A. I naturally got it out of my cattle business and out of the new stock I was putting in there and what money I could make in business.

Q. In Alaska? A. Yes, sir.

Q. The Carstens Packing Company never furnished any part of it? A. No, sir.

Q. Or Thomas Carstens? A. No, sir.

Q. Now, after you and H. M. Fagerberg had this difficulty in 1910, in the fall of 1910, did H. M. Fagerberg continue in your employment?

A. Yes, sir.

Q. In what capacity did he work, or where did he work after that?

A. He worked that winter at Blackburn, getting out the logs and that spring we freighted the outfit over to Chititu.

Q. You mean the spring of 1911?

A. The spring of 1911—he was over there at Chititu from the first of March until along in April some time and I took him out of there then, I couldn't stand \$150 a month there in the summer time and put in a cheaper man and he went back to Blackburn.

Q. That virtually severed H. M. Fagerberg's con-

(Testimony of J. A. Fagerberg.)

nection with the Chititu store?

A. Yes, sir. [152—135]

Q. What was he principally engaged in after that until July, 1913?

A. In 1911 after he came back from Chititu, about the first of April, we started to put up the building at Kennecott, at Blackburn; he was there and I done the packing and Joe Deschamps and a fellow named Chris Wilson helped a while and Harry done the cooking—we had a tent there—done the cooking and put up the roadhouse.

Q. That was in Blackburn? A. Yes, sir.

Q. You got that house constructed in the fall of 1911? A. Yes, sir.

Q. Did you open it up for the accommodation of guests? A. Yes, sir.

Q. Did you run it yourself on the start?

A. Not on the start I did not.

Q. Who did run it?

A. Harry was in charge of the house at the start and during construction.

Q. When did you rent it?

A. I rented it in the fall of 1912.

Q. In the spring of 1912 did you and H. M. Fagerberg have any difficulty again over his wages?

A. Yes, sir.

Q. State about when that occurred?

A. That happened up there at the Blackburn roadhouse.

Q. About what time?

A. It was along in February, 1912.

(Testimony of J. A. Fagerberg.)

Q. And did you have any serious difficulty at that time? A. Yes, we did.

Q. Had another fight?

A. We had another scrap. [153—136]

Q. Mr. Brock of Cordova appeared on the scene shortly after that?

A. Yes, I wired for Mr. Brock myself.

Q. Did he take any part in adjusting the settlement between you and H. M. Fagerberg at that time?

A. He did; he wrote out a contract at that time, as near as I can recollect.

Q. Do you remember in general the terms of this contract of settlement between you and H. M. Fagerberg at that time?

Mr. RITCHIE.—We object to that; if they have a contract, let them produce it.

Mr. DONOHOE.—The previous witness has testified that the contract was delivered to him after being signed and he has made search for it and couldn't find it.

Q. Do you know what became of that contract after it was signed?

A. No, Harry got it and that is the last I know anything about it.

Q. You have never seen it since?

A. I have never seen it since.

Q. Have you any knowledge now where it is?

A. No, I have not.

Mr. RITCHIE.—I am inclined to think that this is inadmissible. I am unable to see how a new arrangement, wholly between themselves, between Al

(Testimony of J. A. Fagerberg.)

and Harry, is admissible in this action against the United States Marshal. I think it is wholly incompetent for the reason that it is a matter wholly between themselves.

Mr. DONOHUE.—Our contention is that this bill of sale was given for a debt due H. M. Fagerberg for wages. This is one of the links in the chain to show that there was wages due to him from J. A. Fagerberg at the time the bill of sale was executed.

By the COURT.—I remember the former witness was asked regarding a certain paper which he claimed he had lost or didn't know where [154—137] it was, something signed by J. A. Fagerberg—when was that paper executed?

Mr. DONOHUE.—In February, 1912.

By the COURT.—What was its general purport?

Mr. DONOHUE.—The purport was, adjusting the amount due H. M. Fagerberg for wages from J. A. Fagerberg and providing the times of payment—that is the testimony of H. M. Fagerberg in substance.

Mr. RITCHIE.—We regard that as incompetent.

* * *

By the COURT.—The objection will be overruled and exception allowed. The plaintiff is claiming that J. A. Fagerberg and the Carstens Packing Company were in partnership in this matter and he was employed by them; it is for the jury to determine whether that is true or not and this is one of the links of evidence going to show their relations. If the writing were here, it would be admissible and as the foundation is laid, showing its loss and that it cannot

(Testimony of J. A. Fagerberg.)

be produced, he may testify as to its contents.

Recess to 2 P. M.

AFTERNOON SESSION.

Continuation of the direct examination of J. A. Fagerberg.

(By Mr. DONOHOE.)

Q. Do you remember the general terms of the contract made between you and H. M. Fagerberg in February, 1912, drawn up by Mr. Brock? A. Yes.

Q. Just state the general terms of that contract as you remember it.

A. As near as I can remember, we settled on \$4,000. I was to pay two thousand in six months and the other the first of the year, 1913.

Q. Who is Mr. Brock?

A. Manager for S. Blum & Company.

Q. He was friendly to both you and H. M. Fagerberg at that time? [155—138] A. He was.

Q. You say \$2,000 of it was payable in six months?

A. Yes, sir.

Q. What wages was H. M. Fagerberg to have from February on, after this contract was signed?

A. I cut him down to \$100 per month.

Q. When this first six months was up, along in September or October, 1912, did H. M. Fagerberg make any demand upon you for any part of that back wages?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection overruled; defendant allowed an exception.

(Testimony of J. A. Fagerberg.)

A. Yes, sir, he did.

Q. And was there any controversy over it at that time?

A. Yes, sir, we had considerable controversy at that time.

Q. Did you pay him his \$2,000? A. I did not.

Q. What arrangement did you and H. M. Fagerberg make at that time in regard to the payment that was then due of \$2,000 for back wages?

A. I made this arrangement—I told him I would go out and see what Tom Carstens would do about it, and the Carstens Packing Company, and I would take it up with them and if they wouldn't pay his back wages or do anything with it that I would send him a bill of sale for it.

Q. What month was that?

A. This was along in the fore part of October or November, when I was negotiating or trying to get a transfer of the liquor license from Chititu—the time I made the deal with Oscar Breedman.

Q. What do you mean by the deal with Oscar Breedman?

A. When I leased the house. [156—139]

Q. When you leased the Blackburn roadhouse and hotel? A. Yes, sir.

Q. Did you go to Seattle? A. Yes, sir, I did.

Q. About what time?

A. About the 24th of November I left Cordova, of the year 1912.

Q. And at the time of arriving at Seattle, did you have any conversation with the officers of the Cars-

(Testimony of J. A. Fagerberg.)

tens Packing Company in regard to the claim of H. M. Fagerberg for wages? A. Yes, sir.

Q. With whom did you have such conversation?

A. W. H. Prater.

Q. Who was he?

A. Secretary and treasurer for the Carstens Packing Company.

Q. Just state the conversation you had with W. H. Prater in regard to that matter.

A. I told Mr. Prater the trouble I had been having up here and he says, it is the same old story, we have always had that up there—referring back to the old Myers outfit—and I told him what I wanted to do.

Q. What did you tell him you wanted to do in regard to H. M. Fagerberg's account for back wages?

A. I told him I wanted him to take care of that and I would give the Carstens Packing Company—if he would take care of H. M. Fagerberg's account, H. M. Fagerberg's wages, and the rest of the liabilities, I would give the Carstens Packing Company a transfer of the property, all the property I had control of in Alaska.

Q. Is that the same property that appears in the bill of sale that you did give H. M. Fagerberg in July, 1913? A. Yes, sir. [157—140]

Q. What did Mr. Prater say in regard to that?

A. He said he wouldn't have anything to do with it, I could do just as I liked.

Q. Did you have any talk about that time with any other officer of the Carstens Packing Company?

(Testimony of J. A. Fagerberg.)

A. No, he wanted me to go over and see Tom Carstens about it.

Q. Where did Tom Carstens live?

A. His office is in Tacoma, the plant.

Q. Did you go and see Tom Carstens about it?

A. I did.

Q. Did you have any conversation with him?

A. I did.

Q. State the conversation you had with Tom Carstens?

A. I told Mr. Carstens the proposition as I told Mr. Prater; I told him, you take care of Harry's back wages and look out for the rest of the creditors and I will give you a transfer of the property and will call it quit.

Q. What did Mr. Carstens say about it?

A. He said, "No, I don't want anything to do with it; we will just take our loss and you can do as you like."

Q. What did you tell him you were going to do with the property then?

A. I told him when I went out that I would give Harry the property.

Q. When did you actually make a bill of sale to this property to H. M. Fagerberg?

A. The 15th of July, 1913.

Q. Where did you have that bill of sale made out?

A. Seattle.

Q. By whom?

A. George A. Custer. [158—141]

Q. Did you leave the bill of sale with Mr. Custer

(Testimony of J. A. Fagerberg.)

after you signed it? A. Yes, sir.

Q. Did you give him any instructions what to do with it or any letter to write with it?

A. I told him to send it to Harry and told him I wasn't going back to the country any more.

Q. That is the bill of sale that has been introduced in evidence here? A. Yes, sir.

Q. That was about the 15th of July, 1913?

A. Yes.

Q. Did you shortly after that have any other or further conversation with Tom Carstens, the President of the Carstens Packing Co.?

A. Yes, sir; I did.

Q. When?

A. I was away, out of the city, and they started to hunt me up and then they sent for me and I came back from Everett and Prater and myself and Custer went to Tacoma and we had a conversation then and they wanted me to go back to Alaska on account of the Shushana strike.

Q. Who did you have a conversation with when you went to Tacoma? A. Mr. Carstens.

Q. Was Mr. Prater present? A. Yes, sir.

Q. Did Mr. Carstens state to you at that time why he sent for you?

A. Yes, he stated, the Shushana strike is on now and it looks as if we would be able to do something with that and I want you to go up there and get the property back from Harry and see if you can do something with it and get our money back out of it.

Q. Did he state why he thought there was a chance

(Testimony of J. A. Fagerberg.)

to get the money? [159—142]

A. Because of the Shushana stampede—he was very much excited about it at that time.

Q. When did the news reach Seattle about the Shushana strike?

A. Along about the 20th of July, I judge, 1913.

Q. Just describe to the jury the location of the Shushana mining district, with reference to the Blackburn roadhouse—what advantages there are to the roadhouse.

A. The Blackburn roadhouse is situated at the end of the Copper River & Northwestern Railroad—it is a distributing point for the head of the White, Chitina, Nizina, and all the tributary country and has the control of that section of the country; it is the natural gateway, the same as Valdez is to the Copper River country—and that was my argument with the company in putting in the Blackburn place.

Q. Then, as I understand you, people going to the Shushana, get off the Copper River Railroad at Blackburn or McCarthy? A. Yes, sir.

Q. And it is a case of mushing from there into the Shushana? A. Yes, sir.

Q. Now, what kind of a proposition, if any, did Mr. Thomas Carstens make to you in that conversation early in August, 1913, in which he wanted you to come back up here and get Harry Fagerberg to transfer the property back to you or to him?

A. "Well," he says, "You go up there and get the property back and I will give you anything you want." He even went so far as to pay my transpor-

(Testimony of J. A. Fagerberg.)

tation—"and I will take care of all your back alimony," etc., if I would go and straighten it out; he says, "You are the only one can straighten it out."

Q. Was anything said in that conversation about H. M. Fagerberg's back wages, or what interest he should have? [160—143]

A. Well, there was nothing definite said at that very time except, do the best you can—he always did—and I demanded a letter from him giving me instructions what to do.

Q. Did you about that time receive a letter from Thomas Carstens? A. I did.

Q. I hand you a letter, dated Tacoma, Washington, August 15, 1913, addressed to J. A. Fagerberg, Tacoma, Washington, and signed Thomas Carstens and ask you if that is the letter you received from Mr. Thomas Carstens about that time. (Handing witness letter.) A. Yes, sir; it is.

Mr. DONOHOE.—We offer this letter in evidence and ask that it be marked Plaintiff's Exhibit "E."

The letter is admitted in evidence, without objection, marked Plaintiff's Exhibit "E" and read to the Jury by Mr. Dimond, as follows:

**Plaintiff's Exhibit "E" [Letter, August 15, 1913,
Carstens to Fagerberg].**

Tacoma, Wash., August 15, 1913.

J. A. Fagerberg,
Tacoma, Wash.

Dear Sir:

In case you succeed in getting your brother to turn the property over to me you can wire me to that

(Testimony of J. A. Fagerberg.)

effect so I can get my man ready and proceed at once providing you wire to send the man. In case the chances to make money out of the horses and barn is favorable I think best for you to stay up there and keep it agoing until this man arrives. In case you find things unfavorable and no chance to make money out of the horses and barn best come down and not wire us to send a man up until you get down here. In case your brother does not wish to turn the whole, or two-thirds, over to me our Mr. Wilt and Mr. Custer will advise you on how to proceed.

Would advise you to look after this mining claim, Copper Creek and *Tllurin* Mining property. By all means see that the horses and barn are earning money to pay all expenses and when you come back let me know if it can be put in shape whereby the horses and barn can earn money. In case they are not doing well and the chances of earning money are not favorable would advise to dispose of the horses to best advantage and when you come back, then will be the best time to talk things over carefully and decide how to proceed right.

Respectfully yours,

THOS. CARSTENS. [161—144]

Q. Did you come to Alaska shortly after receiving that letter or not? A. I did not.

Q. Why didn't you come to Alaska at that time?

A. I was taking the advice of my attorney and he said I was foolish coming back and I didn't come.

Q. Why were you foolish?

A. On account of the divorce proceedings pending

(Testimony of J. A. Fagerberg.)

against me down there by my wife.

Q. The divorce proceedings were pending against you by your wife in Seattle? A. Yes, sir.

Q. Did you later have another conversation with Mr. Thomas Carstens representing the Carstens Packing Company along the same lines?

A. Along the same lines—I had several of them.

Q. When did that conversation take place?

A. Along in December and along in January—just before I came up.

Q. December, 1913, and January, 1914?

A. December, 1913, and January 1914.

Q. What kind of a proposition did he make to you at that time in behalf of the Carstens Packing Company?

A. Well, he said, you go down there and do the best you can, and make whatever arrangement you can with your brother.

Q. For what purpose were you to make arrangements with your brother?

A. To take care of him for his back wages and take the proposition back from Harry.

Q. That is the Blackburn roadhouse?

A. The Blackburn roadhouse and the horses and the barn and the Chititu store.

Q. The property for which you had previously given a bill of sale [162—145] to him?

A. Yes, sir.

Q. Did you come to Alaska then, shortly after that? A. I did.

Q. When did you come to Alaska?

(Testimony of J. A. Fagerberg.)

A. I left Seattle some time in January—the latter part of February, 1914.

Q. How long had you been out of Alaska previous to that?

A. I left November 20th—I left McCarthy, Alaska, November 20, 1912.

Q. And didn't return until—

A. February, 1914.

Q. Then you were away from there a period of about sixteen months? A. Yes, sir.

Q. When you arrived at McCarthy or Blackburn in February, 1914, who was in charge and who was handling and owning the property named in the bill of sale that you had previously given to H. M. Fagerberg? A. Harry was in charge of it.

Q. Did you have any negotiations with him after you arrived there? A. I did.

Q. And did you make any kind of a deal with him?

A. I made a deal with him, yes, sir.

Q. I hand you Plaintiff's Exhibit "D" and ask you if that embodies the terms of the deal you made with Harry Fagerberg regarding the property at that time? A. It does.

Q. Do you know who drew that up?

A. Yes, sir.

Q. Who? A. Mr. Frank Foster.

Q. Who is Frank Foster? [163—146]

A. An attorney who was at Chitina at that time and afterwards moved to McCarthy.

Q. You took this property, then, under that lease, did you—took possession of it?

(Testimony of J. A. Fagerberg.)

A. Yes, until the consummation of the other proposition with it.

Q. Until the consummation of the incorporation as provided in that agreement? A. Yes, sir.

Q. That corporation was never consummated?

A. That corporation was never consummated.

Q. Why wasn't it consummated?

A. Why, because Tom Carstens and I got into an argument over the control of the property.

Q. Was there anything done by H. M. Fagerberg that interfered with your going through with the contract as agreed to? A. Nothing whatever.

Q. It was just a disagreement between you and Thomas Carstens? A. I and Thomas Carstens.

Q. How long did you have possession of that property under that lease, up to what time?

A. From the fourth of March up to the time of the attachment.

Q. What attachment was that?

A. The attachment the Carstens Company had taken out against me for goods, wares and merchandise for a judgment they had in Seattle.

Q. I hand you a complaint, Carstens Packing Company, a corporation, versus J. A. Fagerberg and ask you if that was served upon you along in August or the latter part of July—if that is the copy that was served upon you? (Handing witness paper.)

A. Yes, sir. [164—147]

Q. That is the complaint upon which the writ of attachment was issued that you speak of?

A. Yes, sir.

(Testimony of J. A. Fagerberg.)

Mr. DONOHUE.—We offer this complaint in evidence and ask that it be marked Plaintiff's Exhibit "F."

The complaint is received in evidence, without objection, marked Plaintiff's Exhibit "F."

Mr. DONOHUE.—I will not read this complaint to you in full. This is a complaint in the case of Carstens Packing Company versus J. A. Fagerberg and is the complaint and suit in which the writ of attachment was issued and levied against the property which we claim belonged to H. M. Fagerberg.

Q. In this cause of action there is a claim of \$2,651.72 being the amount of a judgment obtained against you in King County, State of Washington, by the Carstens Packing Company—state the items that go to make up that judgment.

A. \$700 of that is cash I got according to my own agreement, that at any time I was stuck or needed any help, that I was to get it; that I put into the Seattle home.

Q. Whose home was that?

A. My own personal home, that my former wife had.

Q. Did H. M. Fagerberg have anything to do with that matter at all? A. Nothing whatever.

Q. What was the next item?

A. The next item was, I got meat from them and taken out of my Alaska money, mail money and one thing and another I had at the roadhouse and put into my home down there, and I got meat and put it back into the country in various sections.

(Testimony of J. A. Fagerberg.)

Q. What was the original amount of this judgment against you, as near as you can remember? [165—148] A. About \$2,300.

Q. \$700 of that was money you borrowed direct from the Carstens Packing Company and put into your home in Seattle? A. Yes, sir.

Q. Then it left about \$1,600 which you say you invested in Seattle—did you before investing this \$1,600 in Seattle, take the matter up with the Carstens Packing Company?

A. I did, with Mr. Prater and the Carstens Packing Company.

Q. What did they say in regard to that?

A. They said all right.

Q. Then you invested that money down there with their consent?

A. Their consent and their full knowledge—they knew where I was using it—they knew where I used every dollar. Every time I did anything I always consulted Mr. Prater.

Q. Did H. M. Fagerberg have anything to do with that property in which the \$1,600 was invested or the money?

A. Never had a thing to do with it.

Q. Now, in regard to this four thousand and odd dollars for goods, wares and merchandise and money advanced—that according to this complaint was between the tenth day of March, 1914, and the 12th day of June, 1914. Under what circumstances was that money and goods advanced to you?

A. Well, I wrote and told him the proposition I

(Testimony of J. A. Fagerberg.)

had made and wrote and told him what I wanted and I showed him the draft; I told Harry, I am going to draw a draft on Tom to show you that he is behind me.

Q. Who do you mean by Tom?

A. Mr. Carstens, the president of the Carstens Packing Co. And I turned to and drew a draft for the sum of \$1,500, fifteen hundred and some odd dollars, and the draft was accepted and paid. Also ordered merchandise from him and restocked the [166—149] roadhouse, when I was taking charge of that, and I got that and various other things, meats and one thing and another.

Q. Now, at the time the Carstens Packing Company made this advance to you in the spring of 1914 of goods, wares and merchandise and money, did they have previous, positive knowledge that you had formally transferred the title to the property in question in this suit to H. M. Fagerberg?

A. Yes, sir.

Q. How did they know that?

A. I just simply told them.

Q. When?

A. I told them in July, 1913, that I transferred the property to Harry.

Q. Did you write either Mr. Carstens or the Carstens Packing Co. and tell them the terms on which you took this property back from Harry Fagerberg, in March, 1914.

A. Yes, I wrote to them and told them the terms on which I was taking it.

(Testimony of J. A. Fagerberg.)

Q. Did the terms you set out to them correspond with the terms in Plaintiff's Exhibit "D"?

A. I think they did. The corporation part was explained to them explicitly. On the leasing part, I didn't pay any attention to that part of it, for the simple reason I never thought that would go into effect. I expected after they paid the \$1,500 draft and came through with the merchandise, that they would go through with the incorporation part, which would save them and me also.

Q. During the spring of 1914 you also got other merchandise that you had at McCarthy and Blackburn? [167—150] A. Yes, sir.

Q. What other merchandise did you get up there?

A. I got the oats.

Q. How much oats? A. Forty tons of oats.

Q. Where did you get them or from whom?

A. From Jennings Brothers, LaConner, in Skagit County, State of Washington.

Q. What else did you get?

A. I got merchandise from Schwabacher Brothers and a ton of coffee from the Schilling Company.

Q. What was the cost of the oats at LaConner?

A. The cost of the oats at LaConner was \$25 a ton.

Q. That would be a thousand dollars?

A. That would be a thousand dollars.

Q. You say you got a ton of coffee from Schilling?

A. Yes, sir.

Q. What was the cost of the ton of coffee landed at Blackburn or McCarthy—how much was it a pound?

(Testimony of J. A. Fagerberg.)

A. It cost 32¢ in San Francisco and the freight bill on it was \$125 and the freighting of it into the Shushana.

Q. That would be with the freight landed at McCarthy—\$765? A. Yes, sir.

Q. Where was this coffee at the time the attachment was levied on your property?

A. At Shushana, Alaska.

Q. What did it cost to get it from McCarthy to Shushana?

A. The lowest cost of freighting in there would be about ten cents, the actual cost, without any profit added.

Q. That would be about \$200 more?

A. Yes, sir, that would be about \$200 more.

[168—151]

Q. That would make the coffee cost you \$965 landed at Shushana?

A. I figured it a thousand dollars.

Q. Was that coffee taken in custody by the marshal under the writ of attachment issued against you by this complaint? A. Yes, sir.

Q. Did Harry Fagerberg at any time make any claim to any part of that coffee? A. Yes, sir.

Q. That was attached as your property?

A. Yes, sir.

Q. Where were the oats when this attachment was levied?

A. The better part of the oats were at Charley Davis', about twelve or sixteen miles from Blackburn, at the mouth of the Chitistone.

(Testimony of J. A. Fagerberg.)

Q. Did they attach those oats? A. Yes, sir.

Q. What was the value of the oats that the Carstens Packing Co. attached?

A. The value of the oats at the time the Carstens Packing Co. attached them was ten cents—I had them sold for ten cents.

Q. About how many pounds of oats were there?

A. About eighty sacks—about four tons.

Q. That would be about— A. About \$800.

Q. Now, what other property did you have there that was attached that belonged to you?

A. There was the stock in the store.

Q. Where was the store?

A. At Blackburn, Alaska, alongside the roadhouse or hotel.

Q. What was the value of the goods in that store?
[169—152]

A. In the neighborhood of \$4,000.

Q. That would be altogether about \$5,800?

A. Yes, sir.

Q. Now, did H. M. Fagerberg make any claim to any of that property? A. No, sir.

Q. There is none of that property included in this suit, now before the Court and jury? A. No, sir.

Q. And that is all property that you brought into the country in the the spring of 1914? A. Yes, sir.

Q. And that includes practically all the property with the goods, wares and merchandise that the Carstens Packing Co. sent to you in the spring of 1914.

A. Yes, sir.

Q. Now, the Carstens Packing Co. then attached

(Testimony of J. A. Fagerberg.)

property of your own, to which there was no dispute as to your ownership, to the amount of about \$6,000?

A. Yes, sir.

Q. And that attachment was made previous to taking any of this property from your brother which is now in question in this controversy?

A. Yes, sir.

Q. When was that attachment made on your property if you can recall?

A. As near as I can remember, about the second of August.

Q. What did you do in regard to the property that you had leased from your brother as shown by Plaintiff's Exhibit "E"?

A. I just took and turned it over to him. I said, "Harry, go to it, I am through with it." I turned it back to him. I said, "They can go to the devil"; I said, "I won't fool any longer with it." [170—153]

Q. And did he take possession of that property?

A. Yes, sir.

Q. On the second of August, 1914?

A. Yes, sir, on the evening of the second of August he took possession of it.

Q. Do you know when his property was attached by the marshal?

A. Along about the 6th or 7th, I just came from the Nizina—I don't remember exactly the date.

Q. Did you turn him back the possession of his property on the second of August?

A. Yes, sir, the evening of the second of August.

(Testimony of J. A. Fagerberg.)

Mr. DONOHUE.—That will be all.

Cross-examination by Mr. RITCHIE.

Q. As I understand it, Harry Fagerberg was in Seattle when you made this first deal with Mr. W. H. Prater to take the Nizini store? A. Yes, sir.

Q. At that time he had never been in Alaska?

A. Yes, sir.

Q. Had he been up in the Nizina country?

A. No, sir.

Q. The occasion of his going to Alaska was to take this place in the store at that time? A. Yes, sir.

Q. He had no connection with your cattle deals?

A. No, sir, absolutely none.

Q. He was on the boat, went up on the same boat you did? A. Yes, sir.

Q. And did you take him around and talk to Mr. Prater about this deal? [171—154]

A. No, sir, I did not.

Q. You made the arrangement, I believe you said, entirely with Mr. Prater?

A. Yes, sir, at that time I did.

Q. You didn't see Mr. Carstens about it?

A. I refused to have anything to do with Mr. Carstens—it was Mr. Prater's proposition.

Q. At that time you were personally acquainted with Mr. Carstens? A. Yes, sir.

Q. You had known him for several years?

A. Yes, sir.

Q. But the deal was entirely with Mr. Prater?

A. Yes, it was only on personal friendship that I went into the proposition at all. I had been friendly

(Testimony of J. A. Fagerberg.)

with Mr. Prater for some years and had more confidence in him; Prater had been a partner of mine the year before and we never had any dispute or trouble, and naturally under the conditions and the trouble Myers had had; I simply had to keep away from him.

Q. Did Mr. Prater know that Harry Fagerberg was going up to take charge of the store?

A. Yes, he knew that absolutely—I told him that flat-footed. I refused to go in. I said there wasn't enough money in it for me.

Q. Did you take Harry around and introduce him to Mr. Prater? A. No.

Q. You didn't think it important that he should meet Mr. Prater and get instructions from him?

A. Prater gave me instructions, turned it over absolutely to me—gave me a bill of sale and I was to do absolutely as I pleased with it; he had that confidence in me—I could put in anyone I wanted to and I told him I would put in Harry. [172—155]

Q. You stated you had cattle and did not go to the store that fall with Harry? A. No, sir.

Q. When did you first visit the Chititu store after you took charge over there?

A. January, 1908.

Q. Did you remain there some time?

A. I was there over one day, enough to rest up.

Q. Did you spend any time during the year 1908 there?

A. I don't think I did; I came back; I got about \$800 worth of stuff and took it back in there, restocked the store, and I might have been there a day

(Testimony of J. A. Fagerberg.)

or two then; I was there for about a couple of days when I took the Victor Olsen stuff and brought it back to the mouth of the Nizina and then came on out.

Q. Olsen had a wood contract with the Katalla Company?

A. Yes, sir, Olsen had a wood contract with the Katalla Company.

Q. What property did you own at the time you made this deal with the Carstens people in 1907?

A. I had in the neighborhood of two or three thousand dollars outstanding accounts along the road-houses here; I owned property in Seattle, pretty near every other addition in Seattle; I owned property at Fourth and Boston, Mount Baker Park, Kuen's Addition, University Addition and I think the Scenic Addition in the City of Seattle.

Q. You have since disposed of most of that?

A. Yes, in various ways.

Q. You didn't spend much time in the road-house in 1908?

A. At the Chititu store, I was there very little.

Q. How much time did you spend there in 1909?

A. It was practically the same thing in 1909; I was there in the [173—156] spring, helped in the outfit for a while and I was there that summer and in 1909 there was a deal—in 1909 I began to figure on the place over at Blackburn; I was figuring on it and I had taken in four head of cattle and I was figuring on the transfer of the liquor from the Nizina to McCarthy or Blackburn.

(Testimony of J. A. Fagerberg.)

Q. You didn't spend much time at the Chititu store in the year 1909? A. No.

Q. Were you there much in 1910?

A. Not a great deal, no.

Q. Your work was usually on the trail, either freighting or driving cattle?

A. My work was taking in the supplies in the spring and driving the cattle, yes, sir.

Q. You heard Harry testify he turned most of the money over to you? A. Yes, sir.

Q. Would he do that from time to time or once a year or twice a year? A. It was from time to time.

Q. Did he transfer it to you by mail or turn it over to you when you went in there?

A. Transferred most of it by mail.

Q. Sent it to Seattle?

A. No, most of it came direct to the bank here in Valdez.

Q. You had an account in the Valdez bank?

A. Yes, sir.

Q. This money that you received from him—I believe he stated here that he took in something over \$9,000 in three years. Now, how much of that did you receive, if you remember?

A. I don't just remember.

Q. And what did you use that money for? [174—157]

A. Buying supplies to put back in there from year to year, to restock again, most of it.

Q. Didn't you use any of it for your own business?

A. Naturally would use some of it. I very seldom

(Testimony of J. A. Fagerberg.)

got enough money to pay me for the new stock I put in and I would naturally make the switch.

Q. As a matter of fact, didn't you have all your business more or less mingled together, so you kept no separate accounts—you did what a great many men do who have various interests, you used money as you got it for whatever you most needed it for?

A. Yes, what I most needed it for, on the store or cattle; that was my agreement with them.

Q. You never had an idea how you did stand with the Carstens after the first year you did business with them?

A. No, not after the first year. I thought it would be a whack up on the cattle, anyhow, and they would have their interest in it.

Q. In 1912 was the first time that you and Harry came to an issue over the fact that he was shy on his wages? I believe you and he both said that you had friction over his back wages?

A. The first friction we had over the back wages was in November, 1910. That was the first trouble we ever had.

Q. That was when you were getting out the logs for the roadhouse?

A. That was when I started in there.

Q. When did you talk to Harry about getting out the logs for the roadhouse?

A. That was along in the spring or summer of 1910.

Q. That was the year the Copper River & Northwestern Railroad went through?

(Testimony of J. A. Fagerberg.)

A. They were supposed to be up there the next spring—they hadn't got there yet. [175—158]

Q. The Copper River & Northwestern Railway got past Chitina in the summer of 1910?

A. They got up to Chitina in the fall of 1910.

Q. In September? A. Yes.

Q. And had been grading beyond that and the track went through to Kennecott by the middle of winter.

A. Yes, sir, the track was in Kennecott some time in April, 1911.

Q. And it was in the summer of 1910 when it was known the railroad would be completed some time the next year that you began to figure on Blackburn as a likely place?

A. I figured on that in 1909, when I got in trouble with Birch over the liquors.

Q. As soon as it was known the railroad was going through? A. Yes, sir.

Q. In the fall of 1910 Harry quit the Chititu store, about August or September, I believe, somewhere along there?

A. I don't know just when; I wasn't there.

Q. He has testified to that; and shortly after that he went to getting out these logs to build the Blackburn roadhouse; where did you get out the logs?

A. On McCarthy Creek.

Q. Where is that?

A. At McCarthy, close to McCarthy, comes right past McCarthy.

Q. Who worked with him on that?

(Testimony of J. A. Fagerberg.)

A. You will have to ask him about that, I don't know.

Q. You don't know who worked with him?

A. No.

Q. What was the arrangement under which Harry went down there?

A. He went under the same arrangement he had in Chititu; I was trying to get my money out of the boy. [176—159]

Q. He was working for you for the same old salary? A. Yes, sir.

Q. Who paid the men that worked with him?

A. I guess he did; he had the authority to do that.

Q. He had authority to employ men as he chose?

A. Yes, I told him to go ahead and get out the logs, fell the logs and get them out and pay the men; he had absolute charge of that when I told him to go ahead and do that.

Q. Did you have any talk to him about this \$8,300 that he had in his possession or under his control?

A. Yes, in the fall of 1910.

Q. Was that before he started in on the logging?

A. He had already started; he had the logs practically out and he had the barn up.

Q. And who was paying the wages of the men at that time?

A. I paid them afterwards, after I came in.

Q. At that time they hadn't been paid?

A. At that time they hadn't been paid; he got the supplies from Blum to supply the men, their clothing.

(Testimony of J. A. Fagerberg.)

Q. State your version of the conversation between yourself and Harry over this \$3,800?

A. We got into an argument over it and what started it, somebody issued a check on the Valdez bank, issued a forged check on Harry, and Mr. Lang said to me, "Harry has overdrawn his account," and I said, "I don't see any reason for it," but I said "All right, charge it up to me, to my account," and when I went in there—I had been working hard all summer and had been out on the trail and around and I was cold and cranky, and I jumped on him rough-shod for overdrawing his account, and one thing led to another and I asked him what he had done with the money. "Was [177—160] it necessary to overdraw your account and I have to make it good for you," and he said, "I have \$3,800 for my salary," and an argument came up about the place at Kennecott; "Well," he says, "I am holding that out for my salary and I intend to hold it, too," and the argument went on until we landed into a scrap; I was stronger; I didn't want to abuse the boy and I held him until he cooled down a little bit and told him where he was at and talked him out of it.

Q. Where was the \$3,800 at this time?

A. He had the money in the Scandinavian-American Bank, I think, outside.

Q. He turned that over to you?

A. Yes, he gave me a check for it on the Scandinavian-American Bank.

Q. So you are sure it was in the Scandinavian-

(Testimony of J. A. Fagerberg.)

American? A. Yes, sir.

Q. Did you concede at that time that the \$3800 was due him?

A. Yes, sir, I conceded that the \$3800 was due him, I concluded the \$3800 was due the boy and I think a little more.

Q. How did you persuade him to give it up to you?

A. I said to him, "I put you in here and I am up against it on the proposition," but I told him the advantages of the thing and the points of the argument, and I said, "The property is worth it; any time I fall down you have the house here, when I put in the house—you can't lose any way, even if the Carstens Packing Co. gives you the dirty end of it."

Q. You literally talked him out of it?

A. I literally talked him out of it.

Q. By smooth talk?

A. You bet you, I admit that.

Q. What inducement did you offer him to give up that \$3,800—anything but the desire to help you?
[178—161]

A. No, nothing else but the brotherly feeling there was in that respect. I never offered him any inducements; I told him the prospects of the country and the advantages of the country.

Q. He wasn't to be in on the rake-off?

A. No, sir.

Q. Absolutely had no interest in the Blackburn place? A. No, he had no interest whatever.

Q. Not even an optional interest?

(Testimony of J. A. Fagerberg.)

A. Not even an optional interest; no, he was simply there on a salary and that was the cause of the fight, and the fight between myself and wife was over that old stock and I was standing up for the Carstens Packing Company.

Q. At that time, in the fall of 1910, he was working for you for \$125 and he loaned you this \$3,800 without interest, simply to help you out?

A. That was my understanding with Harry when I put him in there. I thought \$1,500 was good wages and he could let it stay in the business.

Q. Did you still owe him the money in 1912?

A. Yes, sir.

Q. And was that evidenced by a note or anything?

A. He had this contract that Mr. Brock drew up for him.

Q. He never had anything in writing until Mr. Brock drew that up in the spring of 1912?

A. No, sir.

Q. Was it a part of the consideration in the agreement that his wages were cut to \$100 per month?

A. I don't know.

Q. He let you have this \$3,800 indefinitely, without any interest or without anything in writing, until the memorandum agreement [179—162] was drawn up by Mr. Brook in the spring of 1912?

A. Yes, sir.

Q. And he continued under the old arrangement, except that his salary was cut to \$100, until the summer of 1913? A. Yes, sir.

Q. You were down in Seattle for a good many

(Testimony of J. A. Fagerberg.)

months, from November, 1912, until February, 1914—you were there about fifteen months? A. Yes, sir.

Q. You were in Seattle and along the sound all that time?

A. No, I was in California. I left in February; I was in Vancouver and Victoria in February, 1913, and I went direct from Victoria to San Francisco and from San Francisco to Los Angeles and back to Bakersfield.

Q. Were you engaged in business?

A. I was working there.

Q. Different employments?

A. Different employments: I was rustling—most of the time I was trying to get some money for the Krumm property, the Tellurium Mines Company.

Q. You spent about \$6,000 altogether on the Krumm property? A. Yes, sir.

Q. Where did you get that \$6,000?

A. It naturally came out of the business up there, the Blackburn and Chititu stores,—I had instructions to do that and could do it.

Q. There was a good deal of grub furnished for the work on the Krumm property from the Chititu store?

A. Yes, from both places, and also the Seattle Gulch property.

Q. Have the Carstens ever got anything out of the Krumm property?

A. No, sir.

Q. Or have they any of the stock of the Tellurium Mines Co.?

(Testimony of J. A. Fagerberg.)

A. No, but he was offered an opportunity to take hold of it; he [180—163] was offered an opportunity to protect his interest there and he wouldn't do it and wouldn't keep up his assessment work there.

Q. Was he ever offered anything for his share of the stock of goods that went in there?

A. That would naturally go along with the business.

Q. When did you get back to Seattle after your trip to California in the early part of 1913?

A. I got back some time about the 20th of June, if I remember right; I was in Seattle over night and then left and went out on the Tacoma-Eastern and was not back until after the 4th of July, 1913. I think I got home, over at the home place, about the 5th of July, somewhere.

Q. Was the litigation between yourself and wife pending at that time?

A. I think it was, but I had never received the papers.

Q. You made some reference to back alimony—wasn't that as a matter of fact on the decree for maintenance, made up here? A. Yes, sir.

Q. Your wife sued you first for separate maintenance and Judge Cushman made an order directing you to pay her something for maintenance?

A. Yes, sir.

Q. That was in 1912? A. That was in 1912.

Q. And some time in 1913, or possibly later, your wife sued you in the Superior Court of King County,

(Testimony of J. A. Fagerberg.)

Washington, for a divorce? A. Yes, sir.

Q. And this back alimony was the separate maintenance decreed in Alaska? A. Yes, sir. [181—164]

Q. When you went out in the fall of 1912 did you immediately see Mr. Thomas Carstens and Mr. W. H. Prater?

A. I saw them about a week after I got there.

Q. Did you talk over the business up here?

A. Yes, sir, I told them the whole thing from A. to Z, the scrap I had, the efforts to get the liquor license and the deal with Breedman and everything was thrashed over.

Q. During the years that Harry was running the Chititu store up there and turning the money over to you, did you make any allowance to the Carstens Packing Co. or to Mr. Prater?

A. I told them when I was down there what I was doing.

Q. Did you ever make any report or any statement showing the exact financial transactions at Chititu?

A. No, no reports—it was only word of mouth between I and Prater.

Q. You simply dropped in from time to time and talked things over? A. Yes, sir.

Q. Mr. Carstens had his office in Tacoma?

A. Yes, sir.

Q. At the packing-house?

A. At the packing-house.

Q. And Mr. Prater's office is on First Avenue, South, in Seattle—the Seattle end of the Carstens

(Testimony of J. A. Fagerberg.)

Packing Company? A. Yes, sir.

Q. And you saw them both from time to time, turn about?

A. Turn about—I would go over to Tacoma and see Tom.

Q. Did you ever go over to Tacoma with Mr. Prater to see Mr. Carstens?

A. Only once and that was after the transfer of the property.

Q. That was in 1913? A. That was in 1913.
[182—165]

Q. Did you make any report at the time the store was closed up by Harry in 1910—were you around in Seattle shortly after that?

A. I never was in Seattle until some time in January, 1911, and I was there possibly for two weeks, that was in February; I think I got in Seattle somewhere along the latter part of January and I left the 8th of February again to come back up and during that time I wouldn't be positive whether I seen Mr. Carstens or not, but I seen Mr. Prater because my wife had borrowed personally some \$250 from Mr. Prater which I paid back.

Q. That was personal? A. That was personal.

Q. At that time did you have a general conversation with Mr. Carstens or Mr. Prater or anything like a settlement of accounts? A. No.

Q. Or any understanding as to how the business was to be continued in the future?

A. No, none whatever; I told them I didn't think it was fair to myself or the Carstens Packing Com-

(Testimony of J. A. Fagerberg.)

pany to carry on the thing the way it was—it was unsatisfactory to me.

Q. So the matter remained in sort of a comatose state until you came back in the spring of 1913?

A. The summer of 1913.

Q. You got back in June?

A. Yes, the latter part of June?

Q. When did you first see Mr. *Mr.* Carstens or Mr. Prater in the summer of 1913?

A. It was right after the fourth of July; I had been home a day and I went down to Mr. Prater and said, “How about that old mess [183—166] out there” and I said, “I am going to turn it over to Harry, if you don’t take it,” and he said, “I won’t have anything to do with it, go ahead,” and I says, “All right,” I says, “The deal is off now all right; your old Nizina stock is gone and what money I have put in we have lost”; he said, “All right, I won’t have anything to do with it,” and I went to Mr. Custer and said, “George, make out a bill of sale for that stuff up there,” and I gave him the items and that evening I left.

Q. Did the Carstens Packing Co. from time to time ship goods to you to be used at the Chititu store?

A. I don’t believe the Carstens ever shipped a dollar’s worth to be used there.

Q. Did you get goods from other merchants to be used there? A. Yes, I did.

Q. I mean did the Carstens ever send you goods they obtained from other business houses?

A. No, except this last spring, 1914.

(Testimony of J. A. Fagerberg.)

Q. The stock was always replenished by yourself—the purchases were made by you? A. Yes, sir.

Q. After this first conversation with Mr. Prater and he told you he didn't want anything more to do with it, did you then go to see Mr. Carstens?

A. No, sir, I did not; I left that night.

Q. Where did you go? A. I went to LaConner.

Q. You stayed at LaConner a considerable length of time?

A. I was there until the first of September, I judge, and then went to Butte, Montana.

Q. When you returned to Seattle a little later in 1913—what was the occasion of your going to Seattle? [184—167]

A. Mr. Wilt was hunting for me; the Shushana strike was on.

Q. C. F. Wilt, the attorney for the Carstens Packing Co.? A. Yes, sir.

Q. Did he find you there? A. No, sir.

Q. How did you happen to get back? They got into communication with you and you returned to Seattle and saw them?

A. I got into communication with them and I told them, "I will be in Everett to-morrow morning; come over to-morrow morning and I will meet you at the Mitchell Hotel," and I phoned my brother George, I was looking out so they wouldn't trap me on to any deal and I always had a witness from that time on.

Q. Isn't it true that from that time on you were a

(Testimony of J. A. Fagerberg.)

little afraid they might grab you on this old Alaska judgment? A. No, sir.

Q. Weren't Mrs. Fagerberg's attorneys pounding you at that time?

A. No, sir, I was going around just the same as you are right now; I was in Seattle so Mr. Humphreys could get hold of me.

Q. That was *Mr.* Fagerberg's attorney?

A. No, he was the judge of the Superior Court there.

Q. You weren't keeping out of the way then, on that account?

A. No, I was going through Seattle and all around there.

Q. Why did you meet Mr. Prater at Everett?

A. I was going up the Snohomish River at that time. It was Custer and Prater I met. They said, "Go on, go and see Tom." I said, "There isn't much use for me to see Tom; you fellows can settle that." They said, "He wants you to go back up there." At that time I didn't have much faith in the Shushana stampede, but Mr. Prater says, "You know how Tom is, he is all worked up over it; go over and see him anyway," and I says, "All right," and we went [185—168] over there and had a talk with him.

Q. You did go to Tacoma and see Mr. Carstens?

A. I did go to Tacoma and see Mr. Carstens.

Q. Did you talk with anybody besides Mr. Carstens at that time?

A. I don't think I did. Mr. Carstens, Prater and Custer were there in the office.

(Testimony of J. A. Fagerberg.)

Q. Did you talk to Mr. Carstens and Wilt in Tacoma? A. Not at that time, no.

Q. When did you talk to them?

A. The following day, in Tacoma.

Q. About what time was that?

A. That was along the fore part of August, as near as I can remember.

Q. That was some time after you had given the bill of sale to Harry?

A. Yes, it was three or four weeks after the bill of sale was executed.

Q. The bill of sale was executed to him in July.

A. Yes, sir.

Q. At that time you hadn't seen Mr. Carstens and consulted him about it at all?

A. No, I didn't consider—when it came down to the Chititu stock, I refused to have anything to do with Myers and Carstens on it—I was dealing with the Carstens Packing Co. through Mr. Prater.

Q. You say that Mr. Carstens and Mr. Prater, or at least Mr. Carstens, was very anxious for you to go into the Shushana and wanted to outfit you

A. They wanted me to go up and get this property back from Harry. They thought there was a chance of getting this old hardware, getting that out—this stampede is on and maybe you can sell it and pay Harry up and maybe there will be something left for us [186—169] and there might be a boom on so you can do something with the horses.

Q. When did you first tell Thomas Carstens that you had given this bill of sale to Harry?

(Testimony of J. A. Fagerberg.)

A. He was aware of that before.

Q. Are you sure of that?

A. Yes, Prater told me he told Mr. Carstens.

Q. Was he satisfied that everything was turned over to Harry?

A. He must have been, he never made a howl.

Q. Did he consider that he still had an interest?

A. No, I don't think so, not to my knowledge he didn't.

Q. Here is the letter you received from Mr. Cars-tens—"In case you succeed in getting your brother to turn the property over to me, you can wire me to that effect"—He wanted to get the property deeded back to him, or an interest in it?

A. Yes, he wanted the property back.

Q. Further—"In case your brother does not wish to turn the whole or two-thirds over to me our Mr. Wilt and Mr. Custer will advise you on how to proceed"—On what basis did he want the two-thirds turned back?

A. After the Shushana stampede started up I suppose he naturally thought—I couldn't testify what he had in mind.

Q. Didn't he claim he had an interest in it?

A. I don't know what he was claiming.

Q. He never told you he claimed to have an interest in it?

A. No, sir, he never told me he claimed to have an interest in it.

Q. Did he express any dissatisfaction that you had transferred it to Harry?

(Testimony of J. A. Fagerberg.)

A. No, he said something about why didn't you come to me. I said, I never dealt with you, I always dealt with Bill and he was kicking [187—170] at Prater because he didn't accept the bill of sale and go through with it; this was after the stampede.

Q. You say he was very anxious to have you join the stampede and represent them?

A. Yes, they wanted me to straighten this thing out. They offered me transportation, they said they would furnish anything, and they would pay the back alimony, etc.

Q. Who offered that? A. Mr. Carstens.

Q. Did Mr. Wilt make any such offer?

A. I couldn't say, I wasn't dealing with Mr. Wilt.

Q. Was Mr. Wilt present at the time

A. I don't know.

Q. To refresh your recollection—I have here Mr. Hamburger's transcript of your testimony before the referee in bankruptcy at your examination as an alleged bankrupt last fall and I would like to ask you if Mr. Hamburger has got this correctly transcribed: Question by myself. "In these conversations with Mr. Prater you never told him or told C. F. Wilt that you wanted to get this out of your name so your wife couldn't get it"? And your answer. "I never talked to Wilt about it. That wasn't the intention—it was for the purpose of protecting Harry; if they wouldn't come through and protect their own interest and protect Harry, it belongs to him; that was the sole object." That is a correct statement of your evidence?

(Testimony of J. A. Fagerberg.)

A. That is a correct statement of my evidence, yes, sir.

Q. Now, there was some conversation between you and Mr. Prater and Mr. Carstens about your wanting to get the property out of your name?

A. No, sir—it just came up as I told you. I came over from home and went to Mr. Prater and said, “I am going away to-night, what [188—171] are you going to do with that old deal, Harry can’t do anything with it the way it is and there is nobody there and I am going to give him a bill of sale for it and if you want it, say the word,” and he said, “I don’t want anything to do with it, I don’t want the company mixed up with it at all.”

Q. Did you ever make an offer to Mr. W. H. Prater in Seattle or elsewhere to make a bill of sale to him of all the Alaska property?

A. The only time was when I went down there that time, to make it to him or the Carstens Packing Co.

Q. You did offer to do it?

A. Yes, sir, I offered to do it.

Q. Did you state to Mr. Prater that you wanted to get it out of your name so your wife’s attorneys couldn’t get hold of it?

A. No, there was no object—this property was out of the jurisdiction of the courts down there and it wasn’t worrying me at all on that score—I never lost any sleep over that part of it.

Q. You weren’t aware of the fact that they would take the decree down there and collect down there, by taking the proper steps?

(Testimony of J. A. Fagerberg.)

A. I didn't think it would go that far—it was a case of winning with me down there.

Q. Mr. Prater is mistaken then and stating an untruth if he testifies under oath that you proposed to him to turn over all that property to him, everything you had, which was subsequently, a few weeks afterwards, transferred to Harry, in order to prevent your wife getting hold of it?

A. I did not, but I offered it to him or the Carstens Packing Company.

Q. You didn't state it was because of your wife?

A. No, there was nothing about the wife—I came in and he asked me where I had been, etc.

Q. You did make an offer to your friend Bill to transfer all of this property to him? [189—172]

A. To him or the Carstens Packing Company.

Q. On what consideration?

A. That he would take care of Harry.

Q. That was the sole consideration?

A. That was the sole consideration, and look after the rest of the creditors up here, the local creditors of the layout.

Q. That was the sole basis?

A. That was the sole basis, the wife wasn't entering my mind at all.

Q. Now, then, in this same examination last fall before Mr. Ganty, referee, in which the testimony was taken by Mr. Hamburger, I find this transcript and I will ask you whether it is correct—recalling the question and answer I read to you—“Question. What was the arrangement you had with Carstens

(Testimony of J. A. Fagerberg.)

or the Carstens Packing Company about these goods that were shipped up last spring? Answer. After I went to Prater and gave him this talk, told him to protect himself and Harry and do what was right, shortly after, why the Shushana stampede started in any they got excited, anything I wanted then they would advance, they would pay my back alimony—I didn't have a dollar, I went broke on the *Krumm* deal. They first started in to hunt me and some of the boys thought that somebody was after me and they said, 'Get out of sight' and I went back home, and then Custer got hold of me by telephone, and he said, 'They want you to come up here,' and then they wanted me to go back on account of the Shushana stampede; that was along in August, 1913, and I went so far—Wilt got me over there in Tacoma and says, 'You are the only fellow that can go back there and get it back and we will do something with it.' I says, 'I will think about it,' and he says 'Well, if you ain't got the money we will advance you money to pay your [190—173] back alimony and everything else, go ahead and take hold of it again and we will stay with you,' and I said, 'All right,' and Prater agreed to it and when I came home my own folks said, 'Nothing doing, you stay here until you get this other settled up,' and my sister gave me \$45 so I could go to Cordova and the rest of the way I was to beat my way—that was in August, 1913." Is that a correct statement of your testimony last fall?

A. That is incorrect there—that \$45 I got from the Carstens Packing Co.

(Testimony of J. A. Fagerberg.)

Q. This is a conversation between you and your home folks, you say, after talking about your conversation with the Carstens, my own folks said, “nothing doing,” etc.?

A. My sister didn’t give me the \$45—that is a mistake.

Q. You think that is a mistake in the stenographer’s notes?

A. That is a mistake in the stenographer’s notes—I was talking too fast for him.

Q. Is this also a mistake—near the bottom of Page 20; you remember the question and answer I read you a while ago wherein I asked you about your conversation with Mr. Wilt to the effect that you wanted to get this out of your name so your wife couldn’t get it and you answered, “I never talked to Mr. Wilt about it.” Now, on the same page you say, “Wilt got me over there in Tacoma, and says, ‘You are the only fellow that can go back there and get it back and we will do something with it.’ I says, ‘I will think about it,’ and he says, ‘Well, if you ain’t got the money we will advance you money to pay your back alimony and everything else’—Now which of those statements is correct, the statement made near the top of Page 20—that you never talked to Wilt about this, or the statement at the bottom of the page that he offered to pay your back alimony etc.?

Mr. DONOHUE.—We object to that—there is no contradiction in that. [191—174]

By the COURT.—I am not sure that there is a

(Testimony of J. A. Fagerberg.)

contradiction at present. If you find it and point it out to him, you may ask him.

Q. Read that question and answer—read to the bottom of the page. (Handing witness paper.) What I want to get at is, did you or did you not talk to C. F. Wilt about your trouble with your wife?

A. No, I didn't talk to Mr. Wilt about the trouble with my wife. He went with me to the office; Prater, Custer and Carstens had had a conference there in Tacoma and Mr. Wilt came in to it, and we walked out over the bridge there and I was going to take the boat and he was going up-town and I couldn't state just what the statements were, but as far as Mr. Wilt being in on the conversation or statements, I don't remember anything about it.

Q. You say you never talked to him and he never talked to you?

A. He never talked to me directly on anything of that kind. Mr. Carstens was the man—Mr. Prater was the man I went direct to.

Q. The question of back alimony never came up when Mr. Wilt was present?

A. Not when Wilt was present—it was between I and Mr. Carstens.

Q. In other parts of your testimony that you gave in that examination you stated and I believe you stated this morning, if I understood you correctly in answer to Mr. Donohoe's question, that as soon as the Shushana stampede started, Mr. Carstens was anxious for you to go up there and got after you—Now did they or did they not as one of the induce-

(Testimony of J. A. Fagerberg.)

ments offer to pay your back alimony to avoid trouble with your wife?

A. They offered to pay it, yes, sir.

Q. What was the final result of that?

A. Mr. Carstens asked me the amount and one thing and another—I can't recall exactly what was said.

Q. That dicker fell through entirely then?

A. Well, when I wouldn't go back, I called him up over long distance; [192—175] I was up at my brother-in-law's and he said, "All right," and he says, "We will just let it drag along."

Q. It was dropped then?

A. It was dropped then indefinitely.

Q. When did you return from Montana?

A. I went to LaConner and then went to Montana and didn't get back until some time in December, 1913.

Q. When and under what circumstances did you first meet Mr. Prater and Mr. Carstens after your return in December?

A. I couldn't say—I was down in the office several times.

Q. When did you begin negotiations with them on this prospective corporation deal?

A. We were talking over things—I was over in Tacoma several times—I was just talking to find out what he wanted done and how we should frame it up and the future of the thing and he even gave instructions, Mr. Carstens did, to come here and see Mr. Fish in regard to an old account.

(Testimony of J. A. Fagerberg.)

Q. You went over to see Mr. Carstens about this business? A. Yes, sir.

Q. And in a conversation didn't you propose that you organize an incorporation and you go into business on a large scale?

A. I couldn't say, I don't remember.

Q. To get the Shushana business?

A. I don't remember the outcome of the thing. We were talking over the whole thing and all the little details and one thing and another about it—I couldn't say.

Q. When you went over to see Mr. Carstens, was Mr. Wilt present, in January, 1914?

A. He might have been present; he was present some of the time and some of the time he was not.

Q. You discussed at considerable length this proposed incorporation [193—176] out of which Mr. Carstens was to get twenty-seven thousand shares, you ten and Harry seven?

A. There was nothing settled in regard to the incorporation—it was talked over in various ways.

Q. You never did come to any definite understanding about it?

A. It was a case of doing the best you can, Al.

Q. You never came to an agreement with them?

A. We never knew exactly what we would do.

Q. When you came to Alaska, you told Harry you had come to an understanding and the company was shortly to be incorporated?

A. I made him the proposition and told him what I would do and talked it over that way.

(Testimony of J. A. Fagerberg.)

Q. I want the status of this incorporation proposition—when you returned to Alaska in February, 1914; Harry has testified that you came up there and this agreement drawn up by Frank Foster for you boys to sign was only a temporary arrangement until you completed the articles of incorporation?

A. Yes, sir.

Q. Now, you say, as I understand you, that it was wholly indefinite when you left Seattle, that you never came to a distinct arrangement, distinct understanding?

A. After I came here and made the deal with Harry—I had the instructions—do the best you can and try to straighten the thing out and look out for my interests and I went up there with that understanding or authority, if I made the deal with Harry. I wrote Mr. Carstens and told him the circumstances and situation of the thing.

Q. Is it not a fact that you tried very hard to get Mr. Carstens to advance you considerable money to come back to Alaska on, particularly to buy these oats, pay the freight on them and buy [194—177] other goods to ship in there, in the belief that you could make some money in the Shushana with them?

A. No, I was not *try* to induce Mr. Carstens that way. I tried to induce Mr. Carstens to help me out on the Krumm property—I said, you are only protecting your own interests and you have a chance to make something on it.

Q. The proposition was that he was to stand good for those oats you were buying at LaConner?

A. No, sir, he had nothing to do with that—I was

(Testimony of J. A. Fagerberg.)

going to trade mining stock for oats and then I wanted him to turn to and possibly help me on the freight on the thing—that was outside of the deal, if I made any deal, with Harry. Harry wasn't in on the Krumm layout—that was the Tellurium Mines Company, a separate proposition altogether.

Q. You only tried to get money from Mr. Carstens for the development of the Krumm property?

A. Yes, sir.

Q. You said nothing about paying up money for those oats? A. No, sir.

Q. And didn't try to get him to put up money for buying a stock of goods to send up there?

A. No, sir.

Q. And he is mistaken if he thinks that is so?

A. Yes, sir.

Q. What was the arrangement between you and Mr. Carstens which induced you to draw a \$1,500 sight draft on him to pay the freight on those oats?

A. The oats were taken to McCarthy and were never taken to Cordova.

Q. Where did you draw the draft?

A. In McCarthy, through Mr. Lattin.

Q. You turned the draft in to Mr. Lattin?

[195—178]

A. I did.

Q. Did he deliver you the goods as soon as you drew the draft? A. Yes, sir.

Q. What authority had you to draw a sight draft on Mr. Carstens?

A. Only the authority I had, that I had the right

(Testimony of J. A. Fagerberg.)

to do that. I had asked for a man, to send me up a good bookkeeper—I said, “Don’t be cheap about the wages, just as long as the man is all right.”

Q. Did Mr. Carstens authorize you to draw on him under any circumstances, for any amount?

A. He never made any denial or said I could or could not.

Q. Did you say anything to him about the oats proposition?

A. We talked about it—through the Krumm property.

Q. Is it not a fact that you tried to get money from Mr. Carstens to prepay the freight on the oats?

A. No, it is not.

Q. But when you came away from Seattle, Mr. Carstens was not interested in the oats business at all?

A. He was not, no—he virtually had no interest in the oats because I took them on my own speculative interest.

Q. And when you drew a \$1,500 draft on Mr. Carstens at McCarthy you were simply trusting to his good nature?

A. I had consummated the deal with Harry on the incorporation and I had money enough that I could have got at McCarthy—the oats were simple enough—but I needed the money to take hold of the deal I had with Harry. I drew on him and advised him of the draft and asked him to send up a man from Tacoma.

Q. Have you a copy of the letter you wrote him?

(Testimony of J. A. Fagerberg.)

A. This was done by wire—I wired to him.

Q. Carstens is pretty easy to get money out of?

A. That depends how you look at it. [196—179]

Q. As I understood your testimony a few minutes ago, this matter of incorporation was up in the air when you left Seattle?

A. There was no definite plan settled upon—it was talked over one way and another how to deal with Harry.

Q. You came up and made a deal with Harry on your own responsibility and on the strength of that you drew on Mr. Carstens for \$1,500 to pay the freight on those oats that he had nothing to do with and wasn't interested in?

A. The oats were thrown into the deal when I consummated the deal with Harry and were part of the business.

Q. Did you make a proposition to Mr. Carstens that you were to buy those oats for stock in the Tel-lurium Mines Company and the stock was to be deposited in some kind of a deal with him as trustee in Seattle?

A. I don't remember—I was talking over so many propositions on that.

Q. Is it not a fact that nearly all your conversations with Mr. Tom Carstens in January and possibly February, 1914 came to nothing; that Mr. Carstens declined all of them except that he told you as you left that he would let you have \$200 worth of meat?

A. No, I don't remember any statement about

(Testimony of J. A. Fagerberg.)

\$200 worth of meat—I couldn't see where I could get any use out of \$200 worth of meat; that wouldn't last very long.

Q. Referring to your schedules in bankruptcy—here is a summary of the debts and assets; Schedule “A” is the indebtedness and here is a schedule of what you own. Now, there are only two items—the law, as you are probably advised by your attorney, requires you to make a return, whether you have anything or not and it is all represented by, first, stock in trade—that is the stock [197—180] at Blackburn, I suppose? A. Yes, I suppose so.

Q. \$5,745 and debts due on open accounts—\$215.50; property claimed to be exempt, \$100—clothing and jewelry and things like that. Now, that is all you owned; you owned nothing but that stock of goods at Blackburn and you had \$215.50 coming to you on open account?

A. On open account, personal account.

Q. Did you have anything coming to you from the government on your mail contract?

A. Not at that time, no, because I had thrown up the mail and turned that over to Leo Henderson.

Q. Did you have anything coming to you from any of those boys for whom Harry and Henderson had been freighting during the season?

A. No, not at that time.

Q. They had paid you up?

A. Yes, sir, they had paid me up.

Q. What had you done with the money?

A. Spent most of it for my personal expenses to

(Testimony of J. A. Fagerberg.)

Valdez and paid other small debts not in the bankruptcy schedule.

Q. When did you make a trip to Valdez, before this bankruptcy schedule was filed? A. Yes, sir.

Q. How much were your expenses?

Mr. DONOHOE.—We object to that as not proper cross-examination and having no bearing on this particular case.

By the COURT.—He may answer. (Witness did not answer.)

Q. How much did the boys earn in freighting from March to August?

A. I couldn't say, roughly speaking, what they did earn.

Q. About how much? [198—181]

A. The freighting over to the Shushana and the feed scattered over the line and the packing—I got all of Esterly's trade—

Q. Have you any idea how much they took in?

A. No, I have not, only in a general way I judge—the mail contracts for May and June I got \$300 a month on the Shushana and \$125 on the Nizina.

Q. How often was that paid, that mail contract in there? A. Every month.

Q. Paid promptly?

A. Yes, sir, paid promptly.

Q. So you had nothing due in September?

A. No, excepting the money Henderson got from finishing up the contracts.

Q. All the cash you got out of these contracts from March to August you had spent?

(Testimony of J. A. Fagerberg.)

A. Yes, paying freight bills and paying expenses.

Q. It wasn't a profitable business?

A. Just starting up that way; I went to a lot of extra expense and being cut off when the best season was starting. I had to get Mr. Seagraves to wire so the horses would be released so they wouldn't have to shut down the Dan Creek property and Esterly's.

Q. In this action that was brought against you last July, in which Mr. Donohoe has introduced the complaint in evidence, you filed an Answer in which you admit practically all of this indebtedness of \$4,000 except you claim credits that were not allowed you?

A. Yes, sir—I will admit they sent that stuff up here.

Q. Was it at your request?

A. Yes, it was sent at my instructions I sent down there and they also sent about \$3,500 worth over to Nizina besides this \$4,000 which made about \$8,000.

[199—182]

Q. \$500 to Nizina—who handled that?

A. Mrs. Cole handled it after I put Brown out of there.

Q. To whom was that sent?

A. To Elton Brown, care Fagerberg.

Q. That was an agent?

A. Yes, supposed to be an agent.

Q. Brown came up here about what time?

A. Some time in April—I don't remember just when.

Q. He was to represent the Carstens in the business? A. Yes, sir.

(Testimony of J. A. Fagerberg.)

Q. Part of the arrangement with Mr. Carstens was that he was to send a man up there?

A. Yes, I wired for a man to Tacoma.

Q. And he sent Mr. Brown? A. Yes, sir.

Q. You and Brown didn't affiliate very well?

A. We didn't affiliate, not two seconds.

Q. You refused to let Brown come into the game at all?

A. Not exactly—I put him over there at Chititu; he visited the place at Blackburn and he was over at Nizina and I put him to work figuring out some freight bills and one thing and another and he couldn't figure out a freight bill. He went to Chititu and I wouldn't stand for \$150 a month at Chititu any way.

Q. Who was running the store before Brown came? A. There was nobody there.

Q. It hadn't been opened?

A. It hadn't been opened—it was closed all the time I was gone.

Q. You simply sent a lot of things out there and opened it up?

A. Brown went over there with the goods, cleaned the place out and opened up the store with those goods. [200—183]

Q. This was in April, 1914?

A. It was about May, 1914, the first of May, I think.

Q. Were you selling much goods at Blackburn?

A. Quite a bit.

Q. What were your sales running, about?

(Testimony of J. A. Fagerberg.)

A. I judge a thousand or twelve hundred dollars a month.

Q. Had you made any remittances to the Carstens Packing Co. on account?

A. No, it was not my understanding that I was to make any remittance to the Carstens on account except for the meat.

Q. When did Wilt appear on the scene?

A. About July some time.

Q. At that time you had made no remittance to Mr. Carstens? A. No.

Q. You had sold a thousand or twelve hundred a month, something between three and four thousand dollars—what did you do with the money?

A. I transferred it around in the business and bought more stock.

Q. Where?

A. Schwabacher—I had the goods ordered up C. O. D.

Q. In your schedule in bankruptcy there is quite a list covering indebtedness to various persons—is Schwabacher included?

A. I don't think you will find a Schwabacher bill there.

Q. Schedule A—3, creditors whose claims are unsecured—A. Schillings & Co., San Francisco, \$834.57—you owed that—you had ordered that stuff?

A. Yes, sir.

Q. After you went up there in 1914?

A. After I went up there in 1914.

Q. And this Jennings Brothers account, Mt. Vernon is for oats principally? [201—184]

(Testimony of J. A. Fagerberg.)

A. Yes, sir.

Q. Butler Brothers, the Richmond Paper Co., Klock Produce Co., B. F. Goodrich Company, Rosenfeld & Rovils Company—these are accounts for goods you ordered that spring? A. Yes, sir

Q. And ordered on your own account?

A. Yes, sir.

Q. How were those ordered?

A. I couldn't remember just now.

Q. You ordered them as Fagerberg Brothers?

A. It may be Fagerberg Brothers—the account with Butler Bros. had always been carried as Fagerberg Brothers.

Q. Some of the goods came, some of the packages came, as Fagerberg Brothers?

A. They might have—I don't know, I couldn't say.

Q. Here is an order that somebody sent to Schwabacher Brothers, April 7, 1914—whose handwriting is that? (Handing witness paper.) A. My own.

Q. Did you send out that order?

A. I guess I did.

Mr. RITCHIE.—I offer this in evidence.

Mr. DONOHOE.—We object to the introduction of the proposed exhibit in evidence on the ground that it is incompetent, irrelevant and immaterial in this, that there is nothing to show that the plaintiff in this action had any knowledge whatever that such an order had been sent, nothing to show that he authorized the order in the name of Fagerberg Brothers. Objection overruled—plaintiff allowed an exception.

(Testimony of J. A. Fagerberg.)

Mr. RITCHIE.—This is an order on an order blank. [202—185]

Q. Where did you get that blank?

A. It was just an order book.

The order is marked Defendant's Exhibit #5, and read to the jury by Mr. Ritchie as follows:

Defendants' Exhibit No. 5 [Order].

Order No. 43.

Date April 7, 1914.

Schwabacher Bros.

Ship to Fagerberg Bros.

At McCarthy, Alaska.

When ———

How Ship, A. S. S. Co.

Terms, ———

Salesman, ———

Buyer, ———

McCarthy, Alaska, April 7, '14.

1 Case Peacock Buckwheat flour

Schwabacher Bros.

1 cs. Olympic Pancake Flour

Seattle, Wash.

1 gun Graham flour 10s.

Dear Sirs: Enclosed find our or-

2 " Corn Meal 10s.

der #43 for mdse. which please

1 bx. 20 lb. Split Peas

forward on first boat and oblige,

1 cs. Gold dust Washing powder

Yours truly,

5 cs. Kerosene

FAGERBERG BROS.

50 lb. Gran. Spud 5s Ev.

50 lb. Sliced " 5s Ev.

2000 lb. Cen. Best Flour

3 sk. Brown Beans

Mr. DONOHUE.—We make the further objection to the introduction of the exhibit on the ground that there is nothing shown by the exhibit who Fagerberg Brothers are or that the witness is a member of any firm called Fagerberg Brothers.

Objection overruled—plaintiff allowed an exception.

Q. This matter of doing business, using the name Fagerberg Brothers, was simply a habit, was it? It didn't mean anything in business?

(Testimony of J. A. Fagerberg.)

A. It didn't mean anything in that respect—I didn't have no new name to start on until this other fellow came up, until some definite arrangements were made in regard to it.

Q. As I asked Harry—you have been known as Fagerberg Brothers in a general way up in that country—the business has been done in that name for five or six years? And shipments have been made to you as Fagerberg Brothers?

A. Very few. [203—186]

Q. You had an ad in the paper here in Valdez as Fagerberg Brothers? A. Yes, sir.

Q. Who did that?

A. I did myself; I met Charley Wulff where the cafe is and Wulff had been at me for an ad, and I said, "What is it, go ahead," and he said, "\$2.50 a month."

Q. That was how long ago?

A. I don't remember how long ago.

Q. Was it two years ago?

A. It was worse than that.

Q. Three years ago?

A. Yes, it was worse than that. It was along in 1909 or 10, I couldn't tell you which.

Q. Suppose Mr. Wulff should appear and say that he had no connection with the Valdez Prospector until about the last of—July, 1912—then you are mistaken as to it?

A. No, I would not; Wulff was soliciting and working for the Valdez Prospector at that time.

Q. That would go back to 1909 or 10?

A. Along there somewheres, along in the spring.

No. 2679

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Plaintiffs in Error,

VS.

H. M. FAGERBERG,

Defendant in Error.

VOLUME II.
(Pages 225 to 455, Inclusive.)

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Fourth Division.

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Territory of Alaska, Fourth Division.

(Testimony of J. A. Fagerberg.)

Q. You gave the ad to Wulff? A. Yes, sir.

Q. And did you tell him how to put the ad in?

A. No, sir.

Q. Just told him to put the ad in?

A. Just told him to put the ad in. I met him on the street, in front of the Valdez Cafe, I think—that is my recollection of it.

Q. You didn't write the ad?

A. I didn't write the ad.—Charley wrote the ad. himself. [204—187]

Q. You told him he could put an ad in?

A. I told him he could put an ad, in, yes, sir.

Q. And you didn't know what was going in it?

A. No.

Q. Did you read the ad in the paper from time to time? A. Yes.

Q. It probably had some reference to freighting?

A. No.

Q. A reference to general merchandizing?

A. Yes, general merchandise at Chititu.

Q. You had letterheads printed at one time, Fagerberg Brothers?

A. No, we never had a letterhead printed.

Q. You had billheads?

A. In 1910 Harry said he had run out of the old Nizina billheads and he said, "Better send for some billheads," and I had some billheads printed; and the way that came out Fagerberg Brothers, I met Johnson in Seattle and a man connected with the stationery company and told them to get me out several thousand billheads, blank form; I picked out the form and there was nothing said about the heading

(Testimony of J. A. Fagerberg.)

and they knew me from schooldays and knew Harry was with me and they just put it in Fagerberg Brothers.

Q. You didn't tell him to put it in Fagerberg Brothers, General Merchandise, Nizina, Alaska?

A. He asked me what I was doing up there and I said, "This is for a general merchandise store, miners' supplies."

Q. Did you make out the bills against the Victor Olsen estate which figured in the action brought by Victor Olsen against the Katalla Company?

A. I don't think I made out the bills for that—I made out the bills to Victor Olsen, yes. [205—188]

Q. To refresh your recollection, didn't you give to Mr. W. T. Love, who was attorney for Victor Olsen when the case was started, bills covering two or three pages, or three or four pages, giving the items furnished to Victor Olsen and they were on the Nizina letterheads of Fagerberg Brothers?

Mr. DONOHOE.—We object—if the attorney had the billheads he should show them.

A. I have no recollection of that. I don't ever remember talking to Mr. Love on the Victor Olsen deal. Mr. Donohoe was handling that and I think when I was talking to you in Cordova one spring that I told you—I was asking you about the Victor Olsen deal and you gave me certain statements, you had sent the check outside, etc., and I referred you to Mr. Donohoe in regard to the matter and Mr. Donohoe has the notes to this day on the Olsen estate.

Q. That was in the spring of 1912?

A. No, I think it was in the spring of 1911, if I

(Testimony of J. A. Fagerberg.)

am not mistaken; I was talking to you in Cordova in regard to that—my impression is that Harry was here at that time.

Q. I believe you stated that you don't remember whether the statement of account that you furnished to W. T. Love for the action was on your billheads or Fagerberg Brothers.

A. I don't remember ever giving Mr. Love any statements.

Q. Perhaps you gave them to Mr. Cappell to turn them over to Mr. Love?

A. No, I never gave them to Mr. Cappell—I don't think there was any statement issued to any of the attorneys.

Q. Now, Mr. Wilt turned up there last July?

A. Yes, sir.

Q. Mr. C. F. Wilt, the attorney for the Carstens Packing Co.? A. Yes, sir. [206—189]

Q. He came there to try to get some kind of a settlement or arrangement or understanding?

A. Yes, sir.

Q. What did he want?

A. He wanted several things—he wanted an adjustment of the thing; the row between I and the Carstens Packing Company was on the old Nizina stock and in the argument, why I offered to pay him \$4,000 and he was to get his money out of the Chititu stock, according to the agreement I and Brown had come to on that, and then I told him, if he wanted the Nizina store, he could have it and I would get Harry to turn it back and I would stay out of it—I said, “I will get you your \$4,000.”

(Testimony of J. A. Fagerberg.)

Q. Wasn't one issue between you and Mr. Wilt, representing the Carstens Packing Cobpany due to the fact that you were selling goods pretty readily, as you state, at the rate of one thousand dollars per month and was making no remittances either to the Carstens or the other creditors?

A. The other creditors were being paid all the time.

Q. How much did you pay to the other creditors from April to July?

A. The other creditors were getting their money right along—most of the goods came there and the freight and goods were shipped C. O. D.

Q. The new goods came C. O. D. and you were taking up the bills out of the proceeds?

A. Yes, sir.

Q. And at the time Wilt left there you had very little money on hand?

A. At the time Wilt left there I had very little money on hand.

Q. It had all been used up in C. O. D. shipments.

A. It had all been used up in C. O. D. shipments.

[207—190]

Q. As the result of that, Mr. Wilt agreed finally to put Mrs. Cole in charge of the Chititu store?

A. We never agreed to do anything of the kind, between I and Wilt.

Q. How did she happen to go there?

A. I put Brown in there and I put Mrs. Cole in charge—she was already there before Wilt came.

Q. She had been there how long?

(Testimony of J. A. Fagerberg.)

A. I couldn't say exactly, some time in May she went over there—I couldn't say exactly when.

Q. She kept the store open?

A. Yes, sir, she kept the store open.

Q. You furnished her a lot of new goods from the Blackburn store?

A. Not a great sight—there was about \$3,500. I seldom figured on doing any packing of staple stuff between Blackburn and Nizina for the Chititu store, except a few extras.

Q. Did any of the goods that were sent to you by Carstens go into the Nizina store?

A. The whole stock that was in there was Carstens.

Q. The whole shipment went to Nizina practically? A. Yes, sir.

Q. Some of it was kept in the Blackburn store.

A. Very little of it.

Q. The stuff you had in the Blackburn house was what you bought from other parties?

A. Except the first shipment I got from Carstens—that came from Seattle.

Q. The stuff went into the Nizina store as fast as it was shipped up?

A. It went there all in one shipment.

Q. In what month? [208—191]

A. It landed there some time about the first of May.

Q. The first of May a year ago? A. Yes.

Q. When Mr. Wilt left there, had you come to any understanding as to what you were going to do about

(Testimony of J. A. Fagerberg.)

this indebtedness to the Carstens Packing Co.?

A. Wilt made a promise or I agreed with Mr. Wilt that they were simply to step out of the old Nizina store and release me and I was to get out. I said, "Give me a little time and I will give you a bill of sale for the Chititu store," and we agreed on that, and then he came out and jumped on me in the complaint, professional style.

Q. All the money you got from the sale of goods and also from freighting between March and August went into the purchase of new goods from the outside? A. Yes, sir.

Q. That was the reason you were unable to remit anything to Mr. Carstens or pay the wages?

A. Yes, sir.

Q. Your schedule in bankruptcy shows that you owed several hundred dollars to Harry and several hundred I believe to Rudolph Henderson and two or three hundred dollars to Mrs. Damon who was helping to run the roadhouse? A. Yes, sir.

Q. They were all getting \$100 per month?

A. Yes, sir.

Q. And you had paid no wages to any of them?

A. I had paid no wages to any of them.

Q. Because you didn't have money to do it with?

A. Yes, sir. [209—192]

(Questions by the Court.)

Q. Did you keep any books during this time, in 1914? A. I just kept a memorandum.

Q. Is that memorandum available—have you it

(Testimony of J. A. Fagerberg.)

here? A. I think part of it is here.

Q. Does it show what you paid creditors?

A. I have all the bills.

Q. Have you got them here?

A. Yes, I think I have.

(Questions by Mr. Ritchie.)

Q. If you can, produce the bills—state what you paid—you stated most of it was taken up by C. O. D. drafts? A. Yes, sir.

Q. Can you state from memory what those amounted to?

A. No, I could not; it would be pretty hard.

Q. Have you receipts for drafts you took up, showing a large part of it? A. Yes, I have.

Q. Try to get them—this is something I have been trying to get at, how much you paid out during those months, from the time you returned until the attachment on the first of August—could you arrive off-hand at the approximate amount?

A. No, I wouldn't even attempt to get at it.

Q. Could you get them in five minutes? Are they in Mr. Donohoe's office?

A. No, sir, they are not.

Mr. RITCHIE.—We will pass that with the understanding that they will come in later, as part of his examination, cross-examination, and he can produce them to-morrow morning.

The WITNESS.—I will produce them to-morrow morning. [210—193]

Q. You say the Marshal attached a lot of coffee up on the trail somewhere?

(Testimony of J. A. Fagerberg.)

A. That was attached in the Shushana.

Q. By whom, by Frank Hoffman?

A. I suppose so—he is the officer in charge in there.

By the COURT.—What became of this stock of goods that was attached, has it been sold?

Mr. DIMOND.—All at Blackburn, I believe, has been sold—I don't know whether the rest of it has been sold or not.

The WITNESS.—The oats has been sold and I think the coffee; the oats are at the mouth of the Chetistone.

Q. How about the Shushana stuff—was there anything besides coffee in there?

A. There was a few sacks of oats in there; they were damaged, they got wet—I couldn't say about the oats, whether it was sold or not, but I know the coffee has been sold.

Q. I believe you testified that the value of the stuff up there that Hoffman attached, Schilling's ton of coffee and some other stuff, was nearly a thousand dollars and the eighty sacks of oats were worth \$800?

A. Yes, sir.

By the COURT.—Worth \$10 a sack?

A. Yes, sir—it was the summer time and I had them sold at that, what I could spare, when they attached them.

Mr. RITCHIE.—I would like right here to offer in evidence the return of A. F. Hoffman, deputy marshal, in the case against J. A. Fagerberg on his service of the attachment, the object being to show

(Testimony of J. A. Fagerberg.)

the value of the stuff.

Mr. DIMOND.—We have no objection to it.

Mr. RITCHIE.—We might have a copy made and have it understood that [211—194] it can be substituted for the original.

By the COURT.—Yes, sir.

(Copy, when received, to be marked Defendant's Exhibit #6.)

Q. Did you see this stuff about the time it was attached or just prior to that?

A. No, I never seen it since it was in the Shushana.

Mr. Ritchie read Exhibit 6 to the jury as follows:

Defendant's Exhibit No. 6 [Return of Deputy Marshal Hoffman].

United States of America,

District of Alaska,

Third Division,—ss.

I hereby certify that I received the annexed Writ of Attachment on the 8th day of August, 1914, and thereafter on the same date I served the same at Chisana, Alaska, by taking into my possession the following described personal property of the defendant herein, J. A. Fagerberg:

2 Cases J. B. Agens Butter, 24 cans to case in 2# cans.

16 Cans J. B. Agens Butter, broken lot 2# cans.

18 Sax Oats, very bad condition, wet and growing in sacks.

19 Cases Shillings Coffee—60 1# cans to case.

(Testimony of J. A. Fagerberg.)

9 Cans in broken lot—1# cans.

11 Cases Shilling's Coffee, 2# Tins 30 cans to case.

29 Cans, Broken Lot, 2# to can.

And thereafter, on the same date, I posted a copy of this writ of attachment on the door of a cabin belonging to defendant, J. A. Fagerberg, at Chisana, Alaska, certified to be such by the U. S. Marshal for this Division. That at the time of the levy there was no one in the occupancy of said personal property.

By A. F. HOFFMAN,
U. S. Deputy Marshal.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 10, 1914. Arthur Land, Clerk. By T. P. Geraghty, Deputy.

Q. How much was at Mr. David's roadhouse?

A. My recollection, about eighty sacks of oats, 78 sacks. [212—195]

Q. You don't know of your own knowledge how much was there? A. No but I have an idea.

Q. The boys were packing and they would report to you from time to time?

A. When they took any out.

Q. It had been taken away either by your own people or stolen by someone else?

A. There isn't much danger of being stolen. There were 78 sacks, I think it was.

Q. I will call your attention to Millsap's return; after describing the other property attached in different places, in the fourth paragraph he says:

(Testimony of J. A. Fagerberg.)

“And thereafter on the same day, I served the same at David’s roadhouse, by delivering and leaving with Chas. Davids, Proprietor, a copy thereof, certified to be such by the United States Marshal, upon Chas. David, by levying upon 78 sacks of oats, marked J. A. F. & Co., all the right, title and interest of the defendant herein, J. A. Fagerberg, and by placing in charge of said oats Chas. Davids, Custodian.”

Do you know in what condition those oats were?

A. They were in first-class condition.

Q. How long since you had seen them?

A. I saw them a few days before that.

Q. They were in good condition?

A. They were in good condition, first class.

Q. When Mr. Millsap first came to levy the attachment at the Blackburn roadhouse, you and Mrs. Damon both made a war talk to him, didn’t you?

A. No, sir.

Q. Didn’t you in the first place threaten to resist going out?

A. No, I said, “Go to it, Jim,” there you are; no war talk to it.

Q. That was when he first came there?

A. That was when he first came there; I told Jim where to head in at later. [213—196]

Mr. RITCHIE.—I will offer in evidence the return of Deputy Marshal Millsap, on his service of the attachment.

Admitted in evidence, without objection, marked Defendants’ Exhibit 7. The Exhibit reads as follows:

**Defendants' Exhibit No. 7 [Return of Deputy
Marshal Millsap].**

United States of America,
Territory of Alaska, Third Division,—ss.

I hereby certify that I received the annexed writ of attachment at McCarthy, Alaska, on the 2d day of August, 1914; I served the same at Blackburn, Alaska, by levying upon all the right, title and interest of the defendant herein, J. A. Fagerberg, general merchandise store, at Blackburn, Alaska, and more particularly described by inventory which is herein attached.

By posting in a conspicuous place upon said premises two notices and serving a copy of the attached writ, certified to be such by the U. S. Marshal for this Division, upon J. A. Fagerberg, the one in charge of said store, and by placing in charge of said store T. T. Lane as custodian.

And thereafter, on the 3d day of August, 1914 I served the same upon Mrs. Lily Damon at Blackburn, Alaska, who claimed to have keys and charge of warerooms for H. M. Fagerberg, by delivering to and leaving with Mrs. Lily Damon a copy thereof, certified to be such by the United States Marshal, by levying upon all the right, title and interest of the defendant herein, J. A. Fagerberg, all general merchandise in said wareroom and more particularly described by inventory which is herein attached.

And thereafter on the same day I served the same at David's Roadhouse, by delivering and leaving with Chas. Davids, Proprietor, a copy thereof, certi-

fied to be such by the United States Marshal, upon Chas. David, by levying upon 78 sacks of oats, marked J. A. F. & Co., all the right, title and interest of the defendant herein, J. A. Fagerberg, and by placing in charge of said oats Chas. Davids, Custodian.

And thereafter on the 4th day of August, 1914, I served the same at the Chititu store, by delivering to and leaving with Mrs. C. F. M. Cole, manager of said store, a copy thereof, certified to be such by the U. S. Marshal, by levying upon all the right, title and interest of the defendant herein, J. A. Fagerberg, in said store, and more particularly described by inventory which is herein attached, and by placing in charge of said store Mrs. C. F. M. Cole as Custodian.

And thereafter, on the 6th day of August, 1914, I served the same by delivering to and leaving with H. M. Fagerberg, at Blackburn, a copy thereof, certified to be such by the U. S. Marshal, by levying upon all the right, title and interest of the defendant herein, J. A. Fagerberg, to wit: Roadhouse, barn, outbuildings, horses, more particularly described by inventory, which is herein attached and by placing in charge of said horses A. A. Hepler as Custodian.

Returned this 8th day of August, 1914.

F. R. BRENNEMAN,

U. S. Marshal.

By Jas. M. Millsap,

Deputy U. S. Marshal. [214—196½]

Q. This is a bill made by the Carstens Packing Company of the stuff furnished to you, money and all, and I will ask you whether it is correct or not?

(Testimony of J. A. Fagerberg.)

The amount seems to correspond with what you have admitted.

A. That is practically correct; to the best of my knowledge it is.

MR. RITCHIE.—That's all.

Redirect examination:

(By Mr. DIMOND.)

Q. Now this Victor Olsen matter—was any evidence given of that Victor Olsen debt?

A. Yes, there was a couple of notes given.

Q. I herewith hand you three notes, each dated Valdez, Alaska, July 8, 1909, and signed by Victor Olsen and ask you if they were given to you and signed by Victor Olsen as evidence of this account?

A. Yes, sir.

Mr. DIMOND.—I now ask that these notes be admitted in evidence and marked Plaintiff's Exhibit "G."

They are so admitted, without objection, marked Plaintiff's Exhibit "G."

Q. What did these notes represent?

A. They represent merchandise I delivered to Olsen.

Q. Where did it come from?

A. Part from Valdez, hay and grain, and part came from the Chititu old stock, in the spring of 1908.

Q. What became of all this property you mentioned having had in Seattle at the time you went into business up there in Chititu?

A. I simply lost it. [215—197]

Q. In what way?

(Testimony of J. A. Fagerberg.)

A. My wife got about \$9,000 out of it and I lost about \$11,000. on my transactions there in the Nizina.

Q. You spoke about \$3,500 worth of stuff going over to the Nizina or about that, in the spring of 1914 and you also stated, if I remember correctly, that the Carstens Packing Co. sent that amount of goods in—is that amount included in the account upon which they sued and attached you? No, it is not.

Q. They never did attach that?

A. They never did attach that—they simply attached the store and contents.

Q. That doesn't enter into the suit of Carstens Packing Co. against you at all? A. No.

Q. How many people were employed around your roadhouse during the spring of 1914, in the business of packing or around the roadhouse?

A. You count them and I will enumerate them.

Q. I mean besides yourself.

A. H. M. Fagerberg, Mrs. Damon and Leo Henderson; there was a Jap boy and then I had an extra man on the mail.

Q. Did you pay these men their wages?

A. I paid the Jap boy and the extra man on the mail.

Q. You owe them nothing then?

A. I owe them nothing.

Q. Now, you have spoken of putting sums of money into mining property, mentioning particularly the Krumm property which afterwards became the Tellurium Mines Company, and the property on

(Testimony of J. A. Fagerberg.)

Seattle Gulch—did you or did you not have any agreement with [216—198] Mr. Carstens or the Carstens Packing Co. under which you had agreed between yourselves that you should do this or were permitted to do this? A. Yes, I had.

Q. State the terms of that?

A. In the winter of 1909, I went to him and he was kicking because I couldn't make any money out of the store and the old stock was getting old and he said, "Let it out, grubstake fellows with it and do the best you can with it, Al"; that is the way he would shake his hands when he got disgusted with that old stock.

Q. Do you know what proportion of the amount of this old stock has been sold up to the present time, actually sold?

A. About all that was sold out of it was the flour.

Q. What proportion?

A. It would be less than a third.

Q. How much is left there yet?

A. Most all the hardware is left there yet.

Q. What proportion of the full amount, the old stock? A. According to value?

Q. Yes.

A. According to value and according to the old stock, there is about a third of it left, according to their old invoice, at the prices they were selling at, the inventory they were selling at.

Q. What became of the other third?

A. Part of it was thrown away.

(Testimony of J. A. Fagerberg.)

Q. One-third you say was sold? You said less than a third.

A. Well, what little of it was sold and used up to feed the men.

Q. The prices were materially reduced after you went away? [217—199]

A. Yes, they were cut 75% any way, lots of it.

Q. It wasn't all cut to that extent?

A. No, the flour was cut way down and the milk and a big lot of it was thrown away.

Mr. DIMOND.—That is all.

Q. (By Mr. RITCHIE.) These notes that Victor Olsen gave you, the body of them is in your handwriting? A. Yes, sir.

Witness excused.

[Testimony of John H. D. Bouse, for Plaintiff.]

JOHN H. D. BOUSE, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. DONOHUE.

Q. You are chief deputy marshal for this division, are you? A. Yes, sir.

Q. Mr. Brenneman is at this time out of the Territory? A. Yes.

Q. Do you remember a writ of attachment being delivered to you in July, 1914, in the case of the Carstens Packing Company versus J. A. Fagerberg?

A. Yes, sir.

Q. Delivered to your office for service?

A. Yes, sir.

(Testimony of John H. D. Bouse.)

Q. What instructions did you receive from the plaintiff or the plaintiff's attorney as to what property you should levy that writ of attachment upon?
[218—200]

A. Well, I don't know—any property we could find of Fagerberg's up around McCarthy and the vicinity of McCarthy.

Q. Did you later, some time about the third or fourth of August, 1914, receive a wire from your deputy, James Millsap, at McCarthy, asking if he should levy on the property claimed by H. M. Fagerberg?

A. Yes, I believe so, either he said that or Fagerberg claimed that and wanted to know if he should hold it. I am not sure whether he wired and asked if he should attach it or had attached it and asked if he should hold it.

Q. Did you communicate with any one of the attorneys for the Carstens Packing Co? A. Yes, sir.

Q. And did they give you instructions as to what to do in that respect?

A. They told us to hold the property.

Q. And did they also put up to you an indemnity bond to indemnify the marshal for any damages he might incur by reasons of holding the property?

A. Yes, sir.

MR. DONOHOE.—That is all.

Witness excused. [219—201]

**[Testimony of H. M. Fagerberg, for Plaintiff
(Recalled)].**

H. M. FAGERBERG, recalled for further redirect examination.

(Questions by Mr. DIMOND.)

Q. You stated either yesterday or this morning that you had a short conversation or several short conversations, I have forgotten which, with Mr. C. F. Wilt, the attorney for the Carstens Packing Company in July, I think it was, 1914, while he was at Blackburn? A. I did, yes, sir.

Q. Will you state whether or not you told him that you owned the property for which this suit is brought? A. I certainly did.

Q. Did you show him the bill of sale for that property? A. I did.

By the COURT.—When was this, what date?

A. July, 1914.

(By Mr. RITCHIE.)

Q. You had some conversation with Mr Wilt about your liability on account of the goods shipped up that spring, did you not?

A. No, not to any extent.

Q. You talked something about it?

A. It was mentioned, yes.

Q. Did you make an agreement to make a bill of sale to Thomas Carstens under any conditions, for the Nizina store? A. Not with him, no, sir.

Q. You had no conversation with Wilt about it?

A. No, sir.

Q. You didn't agree to make a bill of sale for the

(Testimony of H. M. Fagerberg.)

Nizina store and all the old goods that were left there if Thomas Carstens would relieve both of you from the old debt that was owing to him on the old store?
[220—202]

A. I don't know what the conditions were—he never talked that over with me. Al came to me and said—"If I give you \$500 will you turn it over to Carstens"? and I said, "You give me the \$500 and I will turn it over to anyone you say."

Q. Did you tell Wilt, either in the presence of Al or when he was not there, that you would help pay for the goods shipped up that spring?

A. I never entered into any kind of an agreement of that kind, to be responsible for the new stock of goods in any shape, manner or form.

Witness excused.

MR. DIMOND.—I want to put in evidence the claim against the estate of J. A. Fagerberg, a bankrupt, filed by the Carstens Packing Co. on the 7th day of October, 1914, sworn to by Thomas Carstens before C. F. Wilt. I ask leave to file a certified copy of it, it being a record in the case of the bankrupt estate of J. A. Fagerberg.

Permission granted; certified copy introduced without objection and marked Plaintiff's Exhibit "H." Mr. Dimond reads the Exhibit to the jury as follows:

Plaintiff's Exhibit "H" [Proof of Claim].

*In the District Court of the United States for the
Territory of Alaska of Third Division.*

In the Matter of the Estate of J. A. Fagerberg,
Bankrupt.

Proof of Claim in Bankruptcy.

At Tacoma, in the State of Washington, on the 7th day of October, A. D. 1914, came Thos. Carstens of the City of Tacoma, in the County of Pierce, in said State of Washington, and made oath, and says that he is duly authorized to make this proof and says that the said J. A. Fagerberg, the person against whom a petition for adjudication [221—203] of bankruptcy has been filed was at and before the filing of the said petition and still is justly and truly indebted to said DEPONENT FIRM CORPORATION in the sum of Ten Thousand Dollars, on account of goods, wares and merchandise belonging to said Thomas Carstens, which said bankrupt converted to his own use.

That the consideration of said debt is as follows: That no part of said debt has been paid; That there are no set-offs or counterclaims to the same; that no note has been received for such account nor any judgment rendered thereon. And that this deponent has not, nor has his said FIRM CORPORATION nor has any person by his order, or to this deponent's knowledge or belief, for his use, had or received any manner of security for said debt whatever.

THOS. CARSTEN.

Subscribed and sworn to before me, this 7th day of October, A. D. 1914.

[Notarial Seal]

C. F. WILT,

Notary Public in and for the State of Washington,

Residing at the City of Tacoma, in said State.

Plaintiffs rests. [222—204]

Defense.

[Testimony of E. E. Ritchie, for Defendant.]

E. E. RITCHIE, called as witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LYONS.)

Q. You are the attorney for the defendant in this case, or one of the attorneys?

A. Yes, one of the attorneys.

Q. And you are also one of the attorneys in the case of the Carstens Packing Co. against J. A. Fagerberg? A. Yes—I have the files here.

Q. There is an allegation made in there to the effect that the time that complaint was filed the Carstens Packing Co. did not know anything about this partnership— Will you please explain that to the jury?

A. That is in the amended answer. I simply wish to explain this, that whatever errors there are, whatever statements of fact that are erroneous in the pleadings, in either case, are due to myself, to a lack of knowledge of the case at the time the pleadings were filed. The case was brought to me in the first instance about noon, possibly a little after, on the

(Testimony of E. E. Ritchie.)

31st of July, I think it was. Fred Glassbrenner came up from Cordova to see me and didn't succeed in finding me until about noon—every time I was out of the office he came and vice versa and we never met until either just before or just after noon, and he then handed me a package of papers, about an inch thick, documents furnished him by Mr. Wilt, and a long letter from Mr. Bunnell. Mr. Bunnell had been retained in the case but was on his way to Skagway to attend a political convention and he forwarded everything to me, with the suggestion that I bring an action and I had instructions to bring an attachment [223—205] suit, and the letter from Mr. Bunnell and the letter from Mr. Wilt to him instructed me to bring the suit against Fagerberg Brothers. I had to go through, as I say, a stack of papers, at least an inch thick, some fine typewriting, in order to familiarize myself with the case and I saw that some of the grounds were simply against J. A. Fagerberg, also that the judgment recovered had been against J. A. Fagerberg and I decided that Wilt and Bunnell were wrong on their view of the case, it was absolutely necessary to bring the case against J. A. Fagerberg, therefore on my own responsibility and contrary to the instructions I had received, I sued J. A. Fagerberg alone and I verified the complaint, as well as the affidavit for attachment, as is shown by the papers in this case. Neither Mr. Carstens nor Prater nor anybody else ever saw that complaint, I guess, to this day, although they have perhaps seen since copies of it. Later on I got further informa-

(Testimony of E. E. Ritchie.)

tion on the case and after Mr. Dimond had filed an amended complaint, we filed an amended answer and that amended answer contains as is shown the statement that at the time the action was brought in July, the last of July, the Carstens Packing Co. did not know that Fagerberg Brothers were partners. That answer was drawn in Seattle by Thomas R. Lyons and sent to me and on that information, I modified and changed it—I did not use the one Tom Lyons sent me but I changed it a little and put in that statement and that also is verified by myself. If there are any inaccuracies or any blunders committed or any contradictions in the pleadings myself and Judge Thomas Lyons are responsible and not Mr. Prater or Mr. Carstens, because they never have seen the original pleadings to this day, for the obvious reason that they have always been in Valdez.

Q. None of the officers of this company live in Valdez at all? [224—206]

A. No and have never been here at all. When I was there, Mr. Carstens was in Tacoma and Mr. Prater was in Seattle.

Q. Mr. Carstens is president of the company and Mr. Prater secretary of the company?

A. I believe so, I think those are their positions.

Cross-examination by Mr. DONOHOE.

Q. On the original suit, in which the Carstens Packing Co. is plaintiff against J. A. Fagerberg, defendant, you say the data was sent you to Valdez?

A. From Mr. Bunnell at Cordova.

Q. Now, that data showed a personal judgment

(Testimony of E. E. Ritchie.)

against J. A. Fagerberg obtained in King County, Washington, some time in July, 1914, did it?

A. Yes, that is correct, except the date—I don't remember the date.

Q. It also showed, that personal judgment showed that neither the Fagerberg Brothers nor H. M. Fagerberg had been made a party to that judgment?

A. I didn't have the full record but there was no mention of H. M. Fagerberg in the judgment.

Q. You had a certified copy of the judgment?

A. Yes.

Q. You know as a lawyer that necessarily H. M. Fagerberg or the Fagerberg Brothers were not parties to the suit when the judgment was obtained against J. A. Fagerberg?

A. It might have been originally brought against H. M. Fagerberg and dismissed as to him, but the judgment, of course, was finally rendered on the pleadings as they stood at the time it was tried.

Q. Now, besides that, there was enclosed a statement of account on a [225—207] Carstens Packing Co. billhead, was there not?

A. I don't think so, there may have been though; I think that came later.

Q. And that statement of account showed it was an account against J. A. Fagerberg?

A. I wouldn't say that, but I would say this, which has the same effect that in the first letter which Mr. Bunnell had written to me, it was admitted that the transactions that Mr. Carstens had were individually with Mr. J. A. Fagerberg, that is that the dealings

(Testimony of E. E. Ritchie.)

personally were with Mr. J. A. Fagerberg.

Q. Have you that statement of account and can you produce it, which is the basis of the second cause of action in the complaint of the Carstens Packing Co. against J. A. Fagerberg?

A. I either have a statement of account or a rough draft of it in one of the letters from Mr. Wilt. I have a stack of letters over at the office that I have not brought to the courthouse.

Q. And that statement of account—it is an account against J. A. Fagerberg individually, is it not?

A. I don't think so, but I will bring it in. I won't undertake to testify until I bring that in. I have half a bushel basket full of statements and letters and I won't undertake to testify what is in them without seeing them again.

Q. You had an account here a few moments ago that you presented to Mr. Fagerberg when he was on the stand on a Carstens billhead? A. Yes.

Q. Can you produce that at this time?

A. It is on the table. I don't remember when that came, I picked that out a day or two ago from a letter much later than July, but I don't know when it came to me.

Q. I hand you a statement on the Carstens Packing Co. stationery, [226—208] dated July 1914 and ask you if that is the statement on which you based your second cause of action in the case of the Carstens Packing Co. against J. A. Fagerberg?

A. I couldn't say but it is my impression that I did not base the second cause of action on any de-

(Testimony of E. E. Ritchie.)

tailed statement but simply on the aggregate amount, as I did in the first place.

Q. Your information was that it was an account against J. A. Fagerberg, was it not?

A. Yes, that is, I think the shipments were made to J. A. Fagerberg and he was the man most directly concerned; I think there is no dispute about that. I think Mr. Carstens admits it in his deposition.

Q. You knew at that time, did you not, that you could not sue H. M. Fagerberg and get a writ of attachment out against him based on a judgment obtained against J. A. Fagerberg?

A. I knew that. Now may I explain right here?

Q. Yes, go ahead.

A. It is for the reason which you can readily understand as a lawyer that I saw I could not join a judgment against J. A. Fagerberg with a joint account against J. A. Fagerberg and H. M. Fagerberg because I would have been demurred out on a misjoinder.

Q. But you knew quite well as a lawyer that an execution issued on a complaint which was the basis of the judgment obtained against J. A. Fagerberg, could not be levied against property of H. M. Fagerberg?

A. No, not if it was really H. M. Fagerberg's property.

Q. You also had no knowledge at that time of the alleged copartnership existing between H. M. Fagerberg and J. A. Fagerberg, as you contend to have?

A. Yes, in a general way I had, myself. [227—
209]

(Testimony of E. E. Ritchie.)

Q. What was that general way?

A. I had seen these ads in the newspaper. I was the principal owner of the newspaper, although I did not have very much to do with running it, while that ad ran, along about 1909 and 1910—the first ad they ran of the Nizina store, I remembered that. I also remembered distinctly that in the Victor Olsen case, in which I succeeded W. T. Love as attorney, one part of it, one of the items of claim, was that of the Fagerberg Brothers against Victor Olsen—I remembered distinctly about that.

Q. Now, did you receive any instructions from Mr. Wilt, who is the conceded attorney for the Carstens Packing Co., directing you to bring a suit against the Fagerberg Brothers at that time?

A. Yes, that was my instructions.

Q. Have you that instruction now?

A. Yes, sir.

Q. Can you produce it to-morrow morning?

A. I will think about it a little bit before I show it to you, because I am not sure but that it is a confidential communication, but I don't mind saying that my instructions from both Mr. Bunnell and Mr. Wilt were to sue Fagerberg Brothers, but they overlooked the fact which I caught quite readily that if they sued on a joint account and on this judgment there would be a misjoinder.

Q. And in order to avoid that misjoinder you sued J. A. Fagerberg and as attorney for the Carstens Packing Co. instructed the marshal to levy on the property of H. M. Fagerberg?

(Testimony of E. E. Ritchie.)

A. No, I instructed him to levy on all the property claimed by either of the Fagerbergs.

Q. Although your suit was against J. A. Fagerberg alone?

A. On the ground that it was partnership property. [228—210]

Q. And if you sued either one of them alone, you could hold any property that *belong* to either of them?

A. It was on this account I dropped H. M. Fagerberg's name; if J. A. Fagerberg and H. M. Fagerberg were both liable on it, each one was liable alone and therefore there was no harm in suing simply J. A. Fagerberg alone.

Q. You knew quite well, however, that suing on a foreign judgment, that H. M. Fagerberg had no opportunity to defend against that judgment, and never had his day in court? A. Precisely.

Q. And in order to enable you to avoid a misjoinder, you brought the suit in the name of J. A. Fagerberg and levied on the property of H. M. Fagerberg under attachment?

A. I don't think I ordered the levy on any independent property of H. M. Fagerberg.

Q. Now, then in regard to the allegation in your amended answer—

Mr. LYONS.—I think this whole line of testimony is incompetent—it is hardly cross-examination. These pleadings show for themselves what has been done. Whatever Mr. Ritchie has done does not bind this plaintiff—they are not responsible for his acts

(Testimony of E. E. Ritchie.)

when he has made an error. The only purpose of putting Mr. Ritchie on the stand was to show that he made this error and he goes into a whole line of questioning regarding partnership law which in my opinion is not relevant to the matter at all.

By the COURT.—Probably both attorneys have been indulging in a little legal argument, but I think these questions may be considered proper cross-examination in view of the testimony offered by Mr. Ritchie himself as to his correction of the pleadings.

Q. Who drew the original amended answer which was filed in the [229—211] case now on trial?

A. As it is filed I drew it. It was changed slightly from one Thomas R. Lyons sent me.

Q. Who drew the first answer? A. I did.

Q. In the first answer you claim that the property is the property of J. A. Fagerberg; in the amended answer you claim that the property is the property of a firm of Fagerberg Brothers, comprising J. A. Fagerberg and H. M. Fagerberg, do you not?

A. That is true.

Q. Now, the purpose of this cross-examination goes further than the testimony just offered in reply to the allegations in that amended answer that Judge Lyons of Seattle sent up to you—Did he not have the allegation in that answer that he did not know of the alleged copartnership between the Fagerberg Brothers at the time of bringing the suit of the Carstens Packing Co. against J. A. Fagerberg?

A. I am not sure but there was probably some-

(Testimony of E. E. Ritchie.)

thing like that—I modified the answer in several particulars.

Q. Have you that original draft?

A. I guess so.

Q. The reason I ask this is, that Thomas Carstens in his deposition, has testified that he knew nothing of that answer, that allegation in the amended answer, not knowing about the copartnership and I would like you to produce that original draft tomorrow morning?

A. If I have it I will do it unless I decide as I said about the other document, that it is a confidential communication and I should not.

Q. That is a matter you can decide—I will not press you and will [230—212] not ask the court for an order.

A. It is only a matter of opinion—if you will allow me to give an opinion, and if you don't like it you can ask to have it stricken out—my opinion is that the answer was drawn by Tom Lyons only after consultation with Mr. C. F. Wilt.

Q. Wilt had been in Alaska just previous to the filing of this suit? A. Yes, sir.

Q. Calling your attention to the original answer which states that if H. M. Fagerberg was in possession of this property at the time of the attachment he was only in possession of it as the employe and agent of J. A. Fagerberg—where did you get that information?

A. I guess out of my own head. I was simply stating the case the best I could on the limited infor-

(Testimony of E. E. Ritchie.)

mation I had—my instructions were to act that way.

Q. You will not state that the original draft of this amended answer which was prepared in Seattle and sent up to you did contain the allegation that the Carstens Packing Co. had no knowledge of the alleged copartnership between the Fagerberg Brothers until after the filing of the complaint in July, 1914?

A. The complaint which was sent to me as an outline was drawn by Mr. Bunnell, I think, on the stationery—

Q. I mean the amended answer—is what I have reference to?

Please read the last question, Mr. Reporter.
(Last question read.)

A. No, I won't say it did not—I think it is very likely it did have something like that but not in those words.

Q. But you say your understanding is that the complaint was prepared after consultation with Mr. Wilt? A. I think so.

(Witness Excused.) Adjourned until ten tomorrow.) [231—213]

Wednesday, May 12, 1915. Morning Session.

Mr. DONOHUE.—Mr. J. A. Fagerberg has the vouchers referred to yesterday by counsel and we will put him on the stand again.

[**Testimony of J. A. Fagerberg, for Plaintiff
(Recalled).**]

J. A. FAGERBERG, recalled for further cross-examination.

(Questions by Mr. RITCHIE.)

Q. You have vouchers there showing what moneys you paid out between March and August, 1914 in your business up there?

A. I have a good share of them, yes, sir.

Q. Will you produce what you have?

(Witness does so.)

Q. First I will ask you if you have any means and data at hand of ascertaining approximately the amount of money paid out in that time on all accounts?

A. Approximately, yes—somewheres between eight and nine thousand dollars, as near as I can get at it.

By the COURT.—This eight or nine thousand dollars is what?

A. It is money I paid out from the time I started in there until the first of August in the year 1914.

Mr. DONOHOE.—From February to August, 1914?

By the COURT.—You paid out that amount of money?

A. Yes, sir.

Q. (By JUROR.) Beginning at what time?

A. Beginning about the 15th of March, 1914.

By the COURT.—From March to August, 1914?

A. Yes.

(Testimony of J. A. Fagerberg.)

Mr. DONOHOE.—That is when you returned from Seattle last spring?

A. That is when I returned from Seattle last spring.

(By Mr. RITCHIE.)

Q. Between eight and nine thousand dollars?
[232—214] A. Yes, sir.

Q. Now, will you just give the amounts, the items, so far as your vouchers and receipts show?

A. The total?

By the COURT.—No, each item, take each item and give the name and amount and what it is for, generally.

A. I will take the freight bills—this will all be freight bill—\$119.59—

Q. Give the name and date.

A. It is the Copper River & Northwestern Railway Co. all the way through 4/2—\$119.59.

Q. On what was that, what shipment, what goods—doesn't it show?

A. Cordova—that is all it shows; it doesn't show the shipping bills or anything else. I can give you the items on the bill.

By the COURT.—Can you tell who it is from and what it was?

A. Why, it is hams and bacon—it is from the Carstens Packing Co.

Q. This is Breedman & Church, laundry?

A. Yes, a bundle of laundry, 83¢

Q. L. A. Brown, charges meat?

A. \$12.83—the shipping bill was made to L. A. Brown.

(Testimony of J. A. Fagerberg.)

Q. This was a freight bill?

A. A freight bill, yes.

Q. On what?

A. On meat and one thing and another, cold storage and covered charges in refrigerator on meat and cartage on same to and from storage, with bill attached. There is a bill covering this somewheres, I don't know where it is. It is dated 4/29, Shipper's orders, J. A. Fagerberg, \$9.59.

Q. Two cases, Chitina, J. A. Fagerberg?

A. \$2.60—I couldn't say what it is or who it is from or anything—the freight bill doesn't show. Fagerberg, Cordova, Blum 50¢ [233—215] Notify Fagerberg, J. A. Cordova, Northwestern, 4/22—20 sacks of sugar, 5 rice, \$72.95.

Q. That is just the freight bill alone?

A. That is just the freight bill alone, yes, sir—these are strictly freight bills.

Q. All of these are freight bills?

A. Yes, sir, all of these are freight bills. J. A. Fagerberg, Blum, 2 sacks, 4/22—\$6.31. Notify Charley Town—I took up the freight bill and took up the merchandise.

Q. What is the amount and date

A. 4/14—Cordova, Blum, \$11.07. Notify Charley Town, Northern Meat Market, one case Chicks 3/20—\$3.28. Notify Charley Town, Cordova, Northern Meat Market, quarter beef, \$6.20, 4/4. J. A. Fagerberg, Cordova, Steamer "Alameda"—I wouldn't be positive on this so I couldn't say. I don't remember just what I did pay on it. Shillings & Co. date

(Testimony of J. A. Fagerberg.)

8/11, Steamer Northwestern, 2 bags coffee \$9.52 C. O. D. \$24.25 and express 90¢ total \$34.95 on that one bill. Klock Produce Co. 8/11 C. O. D. \$37.70 expressage 80¢, freight \$13.50; Fagerberg, Cordova, \$58.37 date 8/17—it doesn't give the steamer. J. A. Fagerberg, Cordova, \$6.58, cash tab 8/17. 4/2 Cordova, Alameda, \$75.69.

Q. What was that? What is the character of the goods?

A. Merchandise, raisins and canned goods.

Q. From whom?

A. I couldn't say where it is from—it doesn't give the initial point.

Q. Proceed.

A. Shipper's orders Fagerberg 7/6—\$34.60. Shipper's orders J. A. Fagerberg 7/6—\$39.67; 7/6—\$3.70 Shipper's orders Fagerberg 6/30—\$5.33. Kluck Produce Co. 6/30—\$107.56. Notify Fagerberg, Cordova, Blum—\$6.37, date 7/3; 6/27—\$5.33; Fagerberg Laundry \$1.49; [234—216] Fagerberg, Cordova, Alameda, date 5/6—\$70.99; Fagerberg, Cordova, Evans, 4/11—\$10.77; Fagerberg, 4/11, bundle of tubs; J. A. Fagerberg 6/9, Cordova, \$48.95; J. A. Fagerberg 6/7—\$18.39. L. A. Brown,, Cordova, 6/9—\$52.42. Shipper's orders, Cordova, 6/15—\$7.91; J. A. Fagerberg, 6/15, Cordova, \$12.69; Shipper's orders, Cordova—\$28.72; 6/15 Shipper's orders, Fagerberg, \$48.17; Shipper's orders 6/16—\$17.27; L. A. Brown 6/2, Cordova, \$9.92; L. A. Brown, \$18.89, 6/2; 6/22, J. A. Fagerberg—\$13.86; Shipper's orders Fagerberg 6/22—\$14.50. Northern Cold Stor-

(Testimony of J. A. Fagerberg.)

age, L. A. Brown, \$2.78; L. A. Brown, freight, 6/22—\$9.22; L. A. Brown, 6/22—\$18.66.

By the COURT.—What does this mean, L. A. Brown?

A. It was shipped up in his name and I took the stuff over.

Mr. DONOHOE.—Who was L. A. Brown?

A. L. A. Brown was supposed to be sent up there as the representative of the Carstens Packing Co.

Mr. DONOHOE.—And some of these bills were shipped in his name?

A. Some of the bills were shipped in his name and I took them over and paid the freight bill.

Mr. DONOHOE.—Some of the goods that Carstens sent up there were shipped in the name of L. A. Brown and turned over to you there and you paid the freight on them? A. Yes, sir.

Mr. DONOHOE.—And L. A. Brown was Mr. Carstens personal representative? A. Yes, sir.

(Questions by Mr. RITCHIE.)

Q. Mr. Brown was the man we had some testimony about yesterday, who was sent up there to take charge? A. Yes, sir.

Q. You and he didn't get along very well? [235—217]

A. No.

Q. You may proceed.

A. Shipper's orders Blum \$44.30, 6/22; 6/22, Cordova \$13.86. Notify Fagerberg 6/22 Steamer Northwestern" \$114.94—on that there is \$181.30 C. O. D. also.

(Testimony of J. A. Fagerberg.)

Q. That is in addition to the \$114?

A. Yes, sir.

Q. The \$114 was freight?

A. Yes, sir—the amount of the C. O. D. was \$179.35 and the expressage on the money was 95¢.

Q. What was the shipment?

A. Forty sacks of sugar.

Q. Where did you get the sugar?

A. From Schwabacher. Shippers orders, freight \$3.63 and C. O. D. \$32.30 dated 6/5; 6/5, C. O. D. \$163.17. Shipper's orders, freight \$40.20; shipper's orders, C. O. D. \$70.97, freight, \$28.97, date 6/5.

Q. Who is that a shipment from?

A. I couldn't say.

Q. And who was the \$163 one from, you just read?

A. From the looks of it it is the Imperial Candy Co. Shipper's orders 6/5, C. O. D., \$70.95, freight \$28.97.

Q. Do you know who that was from?

A. More likely from Schwabacher. Shipper's orders, 6/5, C. O. D., I think, freight, \$32.92—I don't know what the amount of the C. O. D. is on it. J. A. Fagerberg, 6/2—\$15.61. L. A. Brown, 6/2—\$73.23.

Q. What was that a shipment from, Carstens?

A. That was some meat from Carstens. Here is one I don't know what it is—it is only 69¢, I don't know what it is. Fagerberg, 8/24—\$87.54; this is freight on the oats, \$1,638.30.

Q. \$1,500 of that was paid by Mr. Carstens?

[236—218]

(Testimony of J. A. Fagerberg.)

A. Something in that neighborhood, yes, sir.

Mr. DIMOND.—You paid something additional, did you? A.

A. Yes, sir.

Mr. DONOHOE.—And the \$1,500 is included in the claim of Mr. Carstens against you now?

A. Yes, sir.

Mr. RITCHIE.—We want what Mr. Fagerberg himself paid.

Q. How much of the \$1,638 did you pay out of your own funds, do you know?

A. All over \$1,506.

Q. That is, \$132? A. Yes, sir.

Q. Why didn't you draw the draft for the full amount?

A. At the time it was an oversight or clerical error on the part of the clerk somewheres and they came back for a second helping. 3/16—here is another one for \$1.35 on the same article; they came back for three helpings on that.

Q. What is the date of that?

A. 3/16. There is a memorandum here—I don't know whether I have the freight bills to it or not or what it is. The memorandum is Lattin's memorandum—\$1,019.21 freight and there is something like \$559.89 in C. O. D.'s.

Q. What is that shipment?

A. I couldn't tell you, it is just a memorandum of some freight bills of Mr. Lattin's—I couldn't tell you, there might be some of the items in there and some not.

(Testimony of J. A. Fagerberg.)

Q. That is the total of a lot of shipments?

A. That is the total of a lot of shipments, yes, it is a memorandum of his.

Q. It is a memorandum made by the agent there, Mr. Lattin? [237—219] A. Yes, sir.

Q. These are his figures?

A. These are his figures. I paid something like \$800 on the freight bill and was short.

Q. This is the total amount that Mr. Lattin figured up?

A. Yes, sir, this is the total amount that Mr. Lattin figured up—the \$559.89 is C. O. D.'s and the freight \$459.32, that makes \$1,019.21. Here is the Breedman & Church notes you were asking about yesterday, Mr. Ritchie, a thousand dollars, and I paid something like—

By the COURT.—Who was the payee of the note? Mr. RITCHIE.—Breedman & Church.

By the COURT.—What is it for?

A. It was for some merchandise I took when they closed out—I took it over and gave them the notes for it.

Q. It was in the roadhouse?

A. Yes, sir, it was in the roadhouse.

Q. Were you in the roadhouse?

A. No, not in the roadhouse—I took over the stock from them when they were moving out; I took the stock out.

Mr. DONOHOE.—In March, 1914, they had a stock of goods in the store adjoining the roadhouse?

(Testimony of J. A. Fagerberg.)

By the COURT.—You were running a store adjoining the roadhouse?

A. No, I was taking over the stock that Breedman & Church had.

Q. After you took it over, did you conduct a store yourself there? . A. Yes, sir.

Q. Without your brother being interested?

A. Yes, my brother had absolutely nothing to do with it—I had full control of it. [238—220]

Mr. DIMOND.—How did your brother's name come to be signed to it?

A. When it came to be computed I had the note made in three different payments and he said, "I can't take your note for it because Harry has the bill of sale for it and I wouldn't take your word, just your word, for it and you get Harry to sign it," and he went to Harry himself and got Harry to sign the notes separate. There is \$126 over that I paid personally.

(By Mr. RITCHIE.)

Q. What is the total amount of those notes?

A. One thousand dollars, and I paid \$126, I think, something in that neighborhood.

Q. For interest?

A. No, it was for the goods. He just let that run on my own personal account.

Q. Just in the account?

A. Yes, just in the account.

Q. When did those Church notes fall due?

A. June 3d, July 3d, and May 3d.

Q. Did you pay each as it was due?

(Testimony of J. A. Fagerberg.)

A. Yes, sir. Now, here is May 16, Schwabacher, \$110.40; we have here a C. O. D. on the Imperial Candy Co., \$15; for dog salmon, \$10. May 27, Blum & Co.; A. G. Frye, \$21.81, 5/23; May 22, Schwabacher, \$69.72. Here is the Carstens Packing Co. goods and merchandise that came to the house.

Q. How much? A. \$620.27.

Q. That is just one shipment?

A. That is just one shipment, I believe.

Q. (By the COURT.) Came to what house?

A. To the roadhouse, after I went out.

Q. Who is that charged to? Who owes it? Who got it? [239—221]

A. I got it, under my understanding.

Q. What is the date of it?

Mr. RITCHIE.—March 4 and March 19, 1914. There are four of these sheets, one of them March 4th? A. They all came the same time.

Mr. RITCHIE.—You were running the roadhouse yourself, then, for the time?

A. Under this agreement I ran the roadhouse from the 4th of March and also took over the store from Breedman & Church.

(By Mr. RITCHIE.)

Q. There are four of these—is this total carried forward? A. Yes, sir.

Q. What was the total amount?

A. \$620.27. Klock Produce Co. April 11, \$40.32; 4/17—\$21.08 Schwabacher; \$126.75 sight draft with bill attached from Schwabacher; April 30, \$179.35 Schwabacher—E. C. Clise & Co. April 24, \$50; Charles

(Testimony of J. A. Fagerberg.)

Town, April 1, \$45.70, that is from the Northern Meat Market; Schwabacher sight draft \$21.08 bill attached, April 18; \$110.40 Schwabacher, May 18th; May 22, Schwabacher, bill attached to draft \$69.72. Two bills from the Carstens Packing Co. meat bills; Klock Produce Co. May 30, \$73.80; May 30, E. C. Clise & Co., \$43.59; Schwabacher sight draft, bill attached, \$179.35.

Q. Freight separate on that? A. Yes, sir.

Q. How much?

A. You have the freight bills of that if it is in there at all—the \$179.35 is the sight draft with bill attached.

Q. Is it all included in the \$179?

A. Yes, sir. I have given you the Imperial Candy Co. June 5, [240—222] Schwabacher, \$278.55; Rosenfeld, Rovig & Co. \$62.30, June 5; June 18, S. Blum & Co., \$43.65. Have I given you an item of \$278.55? Q. Yes, a moment ago.

WITNESS.—June 5, Flick, Van Slyke & McCumber, St. Paul, May 11, \$81.60; Schwabacher, June 24, \$6.52; June 24, Schwabacher, \$102.84; June 25, Clise, \$16.69; June 25, prepaid \$13.50 on eggs; June 24, Klock, \$34; March 14, A. E. Todd, \$4.00; July 24, Schwabacher, \$41.92; July 24, Frye & Co., \$60.00; Schwabacher, July 23, \$24.55; here is a bill for duplicate slips, \$21.65—it was the cash pads, Pacific Manifold Book Co.; it should be \$20.98, I think. April 21, here is the order Mr. Ritchie made out for Fagerberg Brothers, \$121.15, Schwabacher.

Q. What is the date?

(Testimony of J. A. Fagerberg.)

A. April 21, 1914. Here is a balance on some freight bills of \$189.16 that I have no check on; it is a general balance and memorandum dated 6/14; insurance on the oats, \$7.50; Schwabacher, July 24, \$167.80. That completes what I have. There are other bills, but I have missed them—I don't know where they are in the mixup.

By the COURT.—Can you give approximately the total amount of goods you bought on credit during this time, from March to August, 1914?

A. The credit business I done was very little except what is really in my invoice or schedule in bankruptcy.

(Question by the COURT.)

Q. What does that aggregate about, approximately, haven't you any idea?

A. I can't recall it to mind just now, what it did amount to, to figure it out separately.

Q. Your debts here, according to this, is—H. M. Fagerberg, your [241—223] brother, \$4,800. Now, exclusive of that, your debts would total, according to this, \$13,660? No, that includes the \$4,800.

A. Some of that is the old judgment and one thing and another; that is included in that, too.

By the COURT.—This amount Carstens Packing Co., \$5,918. That is the judgment?

Mr. DONOHOE.—\$2,600 is the judgment and about \$4,020 is goods and money furnished in this enterprise.

By the COURT.—Then \$4,800 of the amount to H. M. Fagerberg and \$2,600 to Carstens on the old account?

(Testimony of J. A. Fagerberg.)

Mr. DONOHOE.—Yes, sir. Then there are some wage accounts there.

By the COURT.—Mrs. Damon, \$150 N. Y. Life Insurance Co. \$150, that is \$300.

Mr. DIMOND.—And there was an additional \$300 to each of these persons.

By the COURT.—I want to get at the total amount of indebtedness incurred by him for goods received during this time.

Mr. RITCHIE.—There is \$900 of claims for priorities for the preceding three months—\$900 additional; they are in the schedule of priorities.

By the COURT.—In round numbers there is about \$5,600 of goods then that you bought on credit during this time? A. Is it that much?

Mr. DONOHOE.—Including the Carstens \$4,000. (By the COURT.)

Q. Did you make any payments on that at all during this time?

A. Not any, according to the books.

Q. How were you to repay this \$4,000?

A. That \$4,000 of Carstens was under this agreement that they [242—224] were to send a man up there, to send me up a bookkeeper or send me up one of their auditors to start a bookkeeper under the corporation, and he was to come in with \$10,000.

Q. Weren't you to pay for these goods, this \$4,000?

A. No, sir. That was his, put in to protect the business and go ahead with it and protect his old interests in it.

Mr. DONOHOE.—That was the working capital of this corporation?

(Testimony of J. A. Fagerberg.)

A. That was the working capital of this corporation, in other words.

Q. And when they didn't incorporate, this *belong* to you, this \$4,000 worth of goods?

A. Naturally speaking, that is *where* Wilt and I were rowing about. I offered to pay him back and we made that agreement, that he was to get that \$4,000 back if he made it a reasonable time so I could adjust myself to those conditions and he agreed for the company, the Carstens Packing Co., consented to it. They were trying to hold me up on the old Nizina stock, that is where the fight came—he was going to force me to pay out \$12,500 for that stock and I claimed that it wasn't worth a thousand dollars to blow it to hell, because I lost all the money I had on it.

(Questions by Mr. RITCHIE.)

Q. Was there any correspondence with Mr. Thomas Carstens or Mr. Prater or any one representing the Carstens Packing Co., regarding that proposed incorporation after you arrived in Alaska in 1914? A. I think we had.

Q. Have you any of those letters in your possession in Valdez?

A. Not to my knowledge, I have not.

Q. Would you say positively whether you received one, two, three or four letters from representatives of the Carstens [243—225] Packing Co., concerning this proposed incorporation?

A. No, I cannot.

Q. Did you receive any from Thomas Carstens

(Testimony of J. A. Fagerberg.)

himself? A. I received some messages.

Q. Did you receive any letters from Thomas Carstens personally regarding this?

A. I know I received one or two, but I don't know where they are at now.

Q. Did you receive any from W. H. Prater?

A. I never received any from Mr. Prater during this last transaction.

Q. The only letters you received were one or two from Mr. Thomas Carstens?

A. From Tom Carstens, the rest of them were missing.

Q. Now, have you been able to figure over night how much money you received from all sources after you returned to Alaska, up to the date of the attachment, about the first of August?

A. No, sir, I couldn't say, exactly, but the best I could give you on that—the way I worked it was from the hotel register—would give you the receipts there, but I haven't got that; I don't know where it is, the hotel register—possibly it is in the house up there.

Q. About how much do you think you got from the roadhouse, that is, from the hotel part of it?

A. I couldn't say; it would average there in the spring, take the average all the way through, it would average ten dollars a day.

Q. For five months?

A. For five months—it might vary.

Q. 300 a month, do you think? A. Yes, sir.

Q. Do you think you took in \$1,500 in cash from the roadhouse? [244—226] A. All of that.

(Testimony of J. A. Fagerberg.)

Q. And you think you took in from the sales of goods at the store, how much?

A. I couldn't say as to that—I also have the sales slips of them.

Q. Are they in the city?

A. No, they are not—they are probably lost in the mixup in the store.

Q. You stated yesterday that you thought the sales ran perhaps a thousand or twelve hundred a month—do you think that is about the amount?

A. I would guess somewhere in that neighborhood.

Q. Would it be as much as \$1,200?

A. Possibly, I wouldn't say definitely.

Q. Would you say a thousand would be nearer the figure? A. Between a thousand and twelve hundred.

Q. Say, \$1,100—that would be \$5,500 for the five months? A. Yes.

Q. Now, you didn't give anything—you didn't get anything from the Nizina store—that was being handled in another way?

A. From the Nizina store I got absolutely nothing.

Q. What did you receive from your mail contracts during that time?

A. I received but very little and that mostly went out for labor.

Q. I am talking about what you received.

A. 300 and 125—\$425 a month.

Q. How many months? A. May and June.

Q. \$850. A. Yes, sir.

Q. And what did you receive from freight contracts?

(Testimony of J. A. Fagerberg.)

A. Most of the freight contracts was the freight from the business, [245—227] say, coffee and ham and bacon that was hauled into the Shushana—most of that was my own work.

Q. Did you do any work for the Kennecott Mines?

A. Not in 1914.

Q. Did you do anything for the people on the Nizina and Chititu?

A. I didn't do any freighting in—some things I packed for the store that Brown took over and I never got credit for a thing.

Q. You received practically nothing for freight during that time?

A. Not to any great extent—the Nizina store during May and June ran about three or four hundred dollars a month.

Q. The business you mean of the Nizina store?

A. No, the packing to the Nizina store.

Q. Did you receive cash for that?

A. No, it went into the Nizina store, most of it—Brown took that.

Q. I want to get at the cash you received.

A. I didn't get any of that in cash at all; I haven't got credit for it yet.

Q. Do you think you got a few hundred dollars in cash for small freight contracts?

A. I might have gotten a few dollars.

Q. Three or four hundred?

A. Three or four hundred, yes, in small lots, pick-ups.

Q. Perhaps \$350, in pick-ups? A. Yes, sir.

(Testimony of J. A. Fagerberg.)

Q. You spoke about paying out on the freight contracts for labor—to whom did you pay that?

A. I don't know who was on that freight layout to Chititu—Harry will have to testify to that.

Q. You had other persons working for you on the freighting besides [246—228] Harry and Henderson?

A. There was ten head of horses and it would take more than two men to handle them.

Q. And how much cash did you pay out for labor, in those five months?

A. It would be close on to a thousand dollars extra labor that I paid for in cash.

By the COURT.—How much profit did you make then on these ten horses during this time?

A. The profit on the horses at that time under the conditions of the business and the conditions of the country was very little. It distributed the feed and gave me the fall business. August and September are the big months. Those ten horses the chances are would run in those two months, August and September, in the neighborhood of about \$4,000, but the preliminary work in distributing the feed all has to be done on the ice in the spring and if you haven't got that established, your feed out, you simply can't do any packing business in that country.

Q. How much cash did you have at the time of the attachment?

A. I had a couple of hundred or three hundred dollars, I guess.

Q. Have any bank deposit anywhere?

(Testimony of J. A. Fagerberg.)

A. No, sir.

Mr. RITCHIE.—That will be all.

(By Mr. DONOHOE.)

Q. You have introduced a number of bills here?

A. Yes.

Q. In whose name are these goods billed to you?

[247—229]

A. J. A. Fagerberg. All except one item.

Q. All but one bill? A. All but one bill.

Q. Of that entire stock of goods, everything there is billed to J. A. Fagerberg?

A. And on individual shipper's orders.

Q. Except one isolated order from Schwabacher which is billed Fagerberg Brothers? A. Yes, sir.

Q. When did Mr. Brown appear on the scene?

A. Some time in April, 1914.

Q. What position did he occupy?

A. He just merely came up there and introduced himself.

Q. What do you know of him in connection with the Carstens Packing Co.?

A. He had absolutely no authority from the Carstens Packing Co. He just came and introduced himself as Mr. Brown and said Mr. Carstens had sent him up there and he had no letter of introduction whatever.

Q. You found out afterwards that he represented the Carstens Packing Co.? A. Yes, sir.

Q. And then what position was he occupying?

A. He was supposed to be their representative.

Q. Do you know whether he was or not, positively?

(Testimony of J. A. Fagerberg.)

A. No, I could not state positively—I never have seen any written statement from the Carstens Packing Co., authorizing him as their representative.

Q. You know the Carstens shipped him goods?

A. Yes, sir. [248—230]

Q. And what became of those goods?

A. Part of them I took over there and part of them he has taken.

Q. Where did he take them?

A. To the Nizina store.

Q. Did he run the Nizina store as the Carstens agent?

A. He ran the Nizina store as the agent for me, he ran it under the Fagerberg Brothers, if I am not mistaken—he used the billheads or paper that was in the store there.

Q. You put him in there?

A. I sent him over there—I pulled him out of there for the reason that I wouldn't stand for \$150, when I could put a person in there for \$60 that would fill the position as well as he did.

Q. Were some of these goods for which the Carstens afterwards sued you on, billed to Brown, shipped to Brown and turned over afterwards to you? A. Yes, sir.

Q. How much was so billed to Brown and turned over to you by him?

A. Well, I have to make a guess at that.

Q. About how much?

A. I should judge in the neighborhood of \$750 or

(Testimony of J. A. Fagerberg.)

\$800, possibly more and it might be less.

(By Mr. RITCHIE.)

Q. Your answer in the action brought against you by the Carstens you admit an indebtedness of about \$4,000, don't you?

A. Yes, I practically admit that—I don't deny that.

Witness excused. [249—231]

[Testimony of E. E. Ritchie, for Defendant
(Recalled).]

Mr. E. E. RITCHIE (Recalled).

(By Judge LYONS.)

Q. When you left the witness-stand yesterday the understanding was that you were to produce any written instructions you had from either Mr. Wilt or Mr. Bunnell concerning the bringing of this suit entitled Carstens Packing Co. against J. A. Fagerberg—I will ask you if you have any of those letters and if so, produce them.

A. Yes, I found a letter written to me by Mr. Bunnell at Cordova. This is a long letter of five or six pages and there are some private matters in it, strictly confidential, on our side of the case, and on every page and I couldn't introduce that letter.

Mr. DONOHUE.—We have no desire that any part of the letter be introduced but if the letter is introduced, we want a chance to see that it covers every portion of this suit.

By the COURT.—What is the purpose of the letter at all, what difference does it make?

Mr. DONOHUE.—I don't know that it makes any

(Testimony of E. E. Ritchie.)

material difference, but the question came up; there is a contradiction in the two answers filed by the defendant in this case. In the first instance they alleged that when this property was attached, it was the property of J. A. Fagerberg, and H. M. Fagerberg if in possession of it was there as the agent or employee of J. A. Fagerberg; in the second amended answer they allege that it was partnership property and that the Carstens Packing Co. had no knowledge of the existence of the alleged copartnership between J. A. & H. M. Fagerberg until after they filed the suit and had the writ of attachment issued. Now, Mr. Ritchie went on the stand yesterday and explained how that allegation came in that amended answer and said I believe that he was instructed by Mr. Wilt to [250—232] bring the suit against Fagerberg Brothers but contrary to those instructions, he thought it safer to bring it against J. A. Fagerberg and that accounted for the way the suit was brought.

Mr. RITCHIE.—I am not going to offer the letter but I have here the complaint which Mr. Wilt and Mr. Bunnell sent for me to file. Mr. Donohoe asked for it yesterday. The letter I am not going to offer, or any part of it, because I cannot introduce all of it. I believe you asked for this memorandum; look at it.

Mr. DONOHOE.—I don't care to look at it unless it has the instructions with it.

Mr. RITCHIE.—It shows practically how I was instructed to bring the suit and I think I will offer it in evidence.

(Testimony of E. E. Ritchie.)

By the COURT.—I don't see that it makes any difference what Mr. Wilt or Mr. Bunnell thought, if Mr. Ritchie says he brought it under a misapprehension; he has stated that and testified to it. I don't see that it is any proof of partnership what Mr. Ritchie thought or Mr. Bunnell or any one else thought; it doesn't either prove or disprove a partnership—that matter must be proven in some other way.

Mr. RITCHIE.—The idea is to show that whatever contradictions there are in the pleadings was due to the Valdez attorney and I understood that Mr. Donohoe wanted to see the original complaint sent to me by Mr. Wilt and Mr. Bunnell.

Mr. DONOHOE.—No, you said you were instructed to bring the suit against Fagerberg Brothers and I said I wanted to see it.

By the COURT.—If you desire to inspect it and there is anything in it, you may do so.

Mr. DONOHOE.—I have no desire to inspect the complaint.

Mr. RITCHIE.—I understood that Mr. Donohoe wanted to see it if I had [251—233] it and it would show that it was a case of misjoinder and would have been thrown out of court if filed in that shape.

Witness excused.

**[Testimony of J. A. Fagerberg, for Plaintiff
(Recalled).]**

J. A. FAGERBERG, recalled for further cross-examination.

(By Mr. RITCHIE.)

Q. This is something you are not directly responsible for, but you can probably explain—in the various bills filed by creditors in your bankruptcy proceedings, I find here a claim of Rosenfeld-Rovig Company against Fagerberg Brothers, McCarthy—did you deal with them as Fagerberg Brothers?

A. You have the bill on the other statement, you can see the bills there.

Q. This is their own sworn statement?

A. I can show you the bills.

Q. Butler Brothers, New York, Chicago, St. Louis, Minneapolis, Dallas, from Minneapolis, Fagerberg Brothers, McCarthy, Alaska, bought about October 14th. These are the verified claims, verified under the bankruptcy law. B. F. Goodrich Rubber Co.—Fagerberg Brothers, McCarthy, Alaska.

A. Hamshaw ordered that and I never gave any instructions regarding that.

Q. After seeing that, I want to know whether or not you did business with them as Fagerberg Brothers.

A. Goodrich—I never gave them any orders; Hamshaw ordered those boots.

Q. Do you know how they got the name Fagerberg Brothers?

(Testimony of J. A. Fagerberg.)

A. No, I haven't the slightest idea. [252—234]

(By Mr. DIMOND.)

Q. I drew up the answer for you filed in the case of Carstens Packing Co. versus J. A. Fagerberg?

A. Yes.

Q. And that answer was drawn by me after you told me all your story, practically as you have related it on the stand, of your relations with these people? A. Yes, sir.

Q. Well, the way you came to admit that indebtedness against you by the Carstens Packing Co. and your waiver of any attempt to hold them legally in the partnership was upon my advice from the statement of what you told me at that time, that you couldn't, in a court of law, hold them for the partnership, inasmuch as you had no sufficient writing to show they were a partner of yours? A. Yes, sir.

Witness excused.

Mr. DONOHUE.—That is our case.

By the COURT.—In regard to the pleadings it seems to me that if either the defendant in this case or the plaintiff is dissatisfied with the state of the pleadings, the proper way would be to meet it by a motion to amend and not show by evidence in this case that the attorney was misinformed as to the facts.

Mr. RITCHIE.—That probably would have been a little better procedure. The reason we did that was that Mr. Donohoe, on taking the deposition of Mr. Thomas Carstens, on cross-examination, asked a lot of questions about that and we thought it was

only fair to make our explanation that Mr. Carstens never had any information regarding the pleadings and knew nothing about them. [253—235]

Stipulation to Take Depositions.

DEFENSE—CONTINUED.

Mr. LYONS.—This testimony was all taken by deposition in Seattle according to the following stipulation, which I will read to you:

*In the District Court for the Territory of Alaska,
Division Number Three.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal for the
Third Division of the Territory of Alaska,
and JAMES M. MILLSAP, Deputy United
States Marshal for the Third Division of the
Territory of Alaska,

Defendants.

IT IS HEREBY STIPULATED AND AGREED
by and between all of the parties to the above-en-
titled action, by their respective attorneys, that the
depositions of Thomas Carstens, W. C. Prater, Her-
man Meyer, Alex. Wilson and Henry Wolf may be
taken at the offices of Lyons & Orton, in the Alaska
Building, at the City of Seattle, State of Washington,
on the 21st day of January, 1915, before B. A. North-
rup, a notary public for the State of Washington,
commencing at the hour of 2:00 o'clock P. M., and
continuing until all of said depositions are taken;

that such depositions may be taken upon oral interrogatories propounded by the counsel at the time; that when such depositions are taken they shall be forwarded to the clerk of the above-entitled court at Valdez, Alaska, and that said depositions may be read in evidence by either of the parties hereto on the trial of the above-entitled action, subject only to objections on account of incompetency, irrelevancy and immateriality.

Dated at Seattle, Washington, this 20th day of January, 1915.

A. J. DIMOND,

T. J. DONOHUE,

Attorneys for Plaintiff.

LYONS & RITCHIE and

LYONS & ORTON,

Attorneys for Defendants. [254—236]

*In the District Court for the Territory of Alaska,
Division Number Three.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal for the
Third Division of the Territory of Alaska,
and JAMES M. MILLSAP, Deputy United
States Marshal for the Third Division of the
Territory of Alaska,

Defendants.

Depositions [of W. C. Prater et al.].

BE IT REMEMBERED that, pursuant to the Stipulation hereunto annexed, and on the 21st day of January, 1915, at Seattle, in the County of King, State of Washington, before me, B. A. Northrup, a Notary Public in and for the said County of King, personally appeared Thomas Carstens, W. C. Prater, Herman Meyer, Alex. Wilson, and Henry Wolf, witnesses, produced on behalf of the defendants in the above-entitled action, now pending in the said court, who, being by me first duly sworn, were then and there examined and interrogated by Mr. Thomas R. Lyons, of counsel for the defendants, and T. J. Donohoe, of counsel for the said plaintiff, and testified as follows:

Mr. LYONS.—I will first read the deposition of Mr. W. C. Prater.

[Deposition of W. C. Prater, for Defendants.]

Q. State your name and place of residence?

A. W. C. Prater—1624 Third West, Seattle.

Q. What is your occupation?

A. I am secretary and treasurer of the Carstens Packing Company.

Q. How long have you lived in the City of Seattle?

A. About ten years.

Q. How long have you been secretary and treasurer of the Carstens Packing Company?

A. About that length of time—about eight or ten years.

Q. Are you acquainted with Thomas Carstens?

A. I am. [255—237]

(Deposition of W. C. Prater.)

Q. He is a member of the firm of Carstens Packing Company?

A. Yes, he is president of the company.

Q. How long has he been president of the Carstens Packing Company? A. Since its organization.

Q. How long is that, or do you know?

A. Incorporated in 1904.

Q. 1894 or 1904? A. 1904.

Q. Do you know J. A. Fagerberg? A. I do.

Q. How long have you known him?

A. I have known him since I have been with the Company, about ten years.

Q. Do you know H. M. Fagerberg? A. I do not.

Q. Do you know when J. A. Fagerberg became interested in the store at Chititu, which was owned by the Nizina Trading Company?

A. In August, 1907.

Q. Do you know of your own knowledge under what circumstances he became identified with that store?

A. Yes, Mr. Alex Wilson had been in charge of the store.

Q. For whom?

A. For the Nizina Trading Company.

Q. Who were the owners of the Nizina Trading Company?

A. At what time, Judge, prior to 1907?

Q. Yes, prior to 1907?

A. Mr. Thomas Carstens and Mr. Herman Meyer were the stockholders at that time.

Q. Do you know what the Nizina Trading Com-

(Deposition of W. C. Prater.)

pany had at that point—at Chititu?

A. It had a large stock of goods. [256—238]

Q. Goods, wares and merchandise? A. Yes.

Q. Do you know what arrangements were made between J. A. Fagerberg and the Nizina Trading Company with reference to that store and all the merchandise contained therein?

A. The arrangements were that it was to be turned over to him by Herman Meyer; my understanding is that the store was turned over to Fagerberg under the same terms and arrangements that Wilson had previously had charge.

Q. What were these arrangements?

A. Those arrangements were that he was to have the equivalent to \$1,500.00 per year for carrying on the store.

Q. Do you know whether or not the Nizina Trading Company, in August, 1907, made an actual transfer of the store and the merchandise contained therein, to J. A. Fagerberg?

A. It was inventoried on August 12, 1907, by Alex Wilson and H. M. Fagerberg.

Q. Do you know whether or not after that inventory was made, there was a bill of sale made by the Nizina Trading Company to J. A. Fagerberg?

A. There was, later on.

Q. Do you know of your own knowledge whether or not the bill of sale was intended to convey to him an ownership or merely to transfer the legal title to him so that he could operate the store as his own?

A. Just for the purpose of him operating the store,

(Deposition of W. C. Prater.)

and so as to change the name of the store in the eyes of the public.

Q. Did you ever induce or attempt to induce J. A. Fagerberg to acquire the store?

A. I never did. [257—239]

Q. Did you ever have any conversation with him about the purchase of that store?

A. Not until after he had taken possession.

Q. That store is situated where—at Chititu?

A. I really cannot say, as I have never been on the ground.

Mr. DONOHOE.—We admit that it is situated at Chititu, the Territory of Alaska.

Q. Now, in July of 1913 did you have any conversation with J. A. Fagerberg with reference to that store and the roadhouse at Blackburn? A. I did.

Q. Where did you have that conversation?

A. At our office in Seattle.

Q. What do you mean by “our” office?

A. The office of the Carstens Packing Company.

Q. Who were present at that conversation?

A. Myself and J. A. Fagerberg.

Q. State the conversation you had with him at that time?

Plaintiff objects to this question as it in no way tends to bind H. M. Fagerberg, it being shown that he was not present, and no authority shown to J. A. Fagerberg to in any manner bind him.

By the COURT.—The objection will be overruled and plaintiff allowed an exception.

A. He came to our office and said he wanted to give

(Deposition of W. C. Prater.)

a bill of sale on all of his property in Alaska to me, and wanted to do it quick.

Q. To whom?

A. To me personally. He wanted I should hold the title until he got settled with his wife; he was afraid his wife would attach it or start some proceedings and tie it up. I told him that [258—240] he did not owe me anything and I could not legally hold it, and I would not accept it, as it would only get us into litigation, and would not be binding anyway, and I suggested that he owed Mr. Carstens, and to give the bill of sale to Thomas Carstens. He hesitated a while and then decided to give the bill of sale to Thomas Carstens. Mr. Wilt is our attorney and generally looks after such matters for us; he is employed exclusively for the company, and he was at that time in the east, and would be back on the 17th, and I asked Fagerberg to delay the matter for a couple of days until Mr. Wilt returned and could fix it up for us without going to another attorney. He said he would, so he went away and Mr. Wilt returned in a few days, and I called him up and called his attention to the matter, and he said we would have to get in touch with Fagerberg and get that bill of sale right away, so I made an effort to locate him and found he had left the city.

Q. Fagerberg had left the city?

A. Yes. He was dodging his wife, expecting her to have him arrested at any time for defaulting in his payment of alimony and put him in jail, and he had hid at La Conner, and Mr. Wilt made a trip up there

(Deposition of W. C. Prater.)

and spent a day there, but failed to catch him; he dodged him; he got wind of some one looking for him and he skipped and Wilt came back to Seattle and took the matter up with Mr. Custer, his brother-in-law.

Mr. DONOHOE.—I understood the question to ask for a conversation that took place at a certain time. I object to this answer as not responsive to the question.

By the COURT.—It goes a little perhaps beyond a strict response, but it may stand. Objection overruled; plaintiff allowed an exception.

Q. You have stated, have you, all of the conversation that you had [259—241] with Mr. Fagerberg the first time with reference to his desire to transfer all his property in Alaska to you?

A. Yes, that was the substance of the conversation,—I was getting to it.

Q. That conversation was held on what date and where?

A. On July 15th, in the office of Carstens Packing Company.

Q. Did you have any other conversation with Mr. Fagerberg relative to this same matter?

A. Not that day.

Q. That day or any succeeding day?

A. If I can go on where I left off—

Objection withdrawn.

A. Mr. Custer got in touch with Mr. Fagerberg, and he objected to meeting Mr. Wilt, but was willing to meet me and Mr. Custer and named Everett as the

(Deposition of W. C. Prater.)

place to meet, so we met him the following day at Everett—I don't remember what hotel, some hotel in Everett, and we went over this matter of the bill of sale, and Fagerberg stated that he had already given a bill of sale to his brother, Harry Fagerberg.

Q. Did he state when he had given that bill of sale to Harry? A. Yes.

Q. Harry is H. M. Fagerberg, is he not?

A. Yes.

Q. Did he state why he had given that bill of sale to his brother?

A. He told us that he had given the bill of sale to his brother, and I asked him if it would not be possible for him to get it transferred or get Harry to give it to Carstens, and he said he could get it by going back to Alaska, and I suggested that he and Mr. Custer go to Tacoma with me and get Mr. Carstens and Mr. Wilt, and try to get the matter straightened out. He [260—242] objected to going to Tacoma, saying the reason was that he was afraid to go through Seattle, for fear he would be arrested, and I convinced him that Seattle was such a big place that he would be able to get through without much difficulty, so he came along, and we went to Tacoma and took the matter up with Mr. Carstens; and the matter of sending Mr. Custer to Alaska was brought up; as Mr. Custer is an attorney and some legal matters might come up—some legal points to settle—

Q. Who was present at that conversation?

A. Mr. Wilt, Mr. Custer, Mr. Carstens, Mr. Fagerberg and myself.

(Deposition of W. C. Prater.)

A. —And Mr. Carstens asked Mr. Custer what he would go for, and he said \$250.00 per month and his expenses, and they talked along for a while, and then Mr. Carstens said that Fagerberg should furnish an inventory, and he said he had an inventory in his house in Seattle, and Mr. Carstens said he would like to see it, and we would go to Seattle that night and he and Custer would go back to Tacoma the next day and decide on the steps to take, so we came to Seattle that night and Fagerberg and Custer went back to Tacoma the next day, and settled on sending Fagerberg.

Q. J. A. Fagerberg?

A. Yes. Mr. Carstens sent me a note to purchase Fagerberg's transportation on a certain boat that was to leave that night, and I bought and paid for his ticket, and at about eight o'clock that night—the boat was to leave at nine—he called me up. I was at the Rainier Club, and he said he was afraid to go to Alaska unless we would agree to pay his back alimony in case they arrested him up there and he would have to pay or go to jail. I told him that was a matter Mr. Carstens would have to settle, for him to go to our office in Seattle, 522-4 First South, and we had a private line to Tacoma, and call up Mr. Carstens from there, and he would give him an answer on that [261—243] question. The next day the ticket was returned.

Q. What ticket do you mean?

A. The ticket for his transportation to Cordova.

Q. When was that?

(Deposition of W. C. Prater.)

A. I could not say just what month it was in, it was after the 15th of July, but how many days I could not say without consulting the books—they will probably show when the check was issued.

Q. In that conversation between you, Fagerberg, Wilt, Carstens and Custer, at Tacoma, did Fagerberg say anything with reference to why he executed a bill of sale conveying all of his property in Alaska to H. M. Fagerberg?

Objected to by plaintiff on the ground that the question is leading. The question should be to state the whole conversation. Question withdrawn.

Q. State whether or not there was anything said by Fagerberg at that time in Tacoma, with reference to why he executed the bill of sale to Harry or H. M. Fagerberg, in which he conveyed all his property in Alaska to him?

Plaintiff makes same objection as to previous question. Objection overruled. Plaintiff allowed an exception.

A. He stated that the bill of sale was made to his brother for the sole purpose of keeping his wife from getting hold of the property.

Q. When he stated that he would go to Alaska for the purpose of getting H. M. Fagerberg to transfer all of the property covered by that bill of sale to the Carstens Packing Co. or to Thomas Carstens, what did he say with reference to whether or not he could accomplish that purpose?

A. He stated that he was positive he could get the transfer made. [262—244]

(Deposition of W. C. Prater.)

Q. Did you see J. A. Fagerberg in 1911 when he was in Seattle? A. Yes.

Q. What time was that?

A. It was—I think it was along in February, 1911.

Q. Did you have any conversation with him at that time with reference to the store at Chititu?

A. I did.

Q. What was that conversation?

A. He came to the office and said he was not satisfied with the conditions in the way he was operating there, and he did not think it was satisfactory to the company.

Q. To what company?

A. The Carstens Packing Company, or Thomas Carstens. He would like to know where he stood as to the Nizina store, so he would be in a position to handle it as he ought. I asked him if he did not want to buy the store; he said he would buy it, and I asked him what the stock was worth, and he said it was probably worth more than he would give for it, and I asked him what he would give, and he said \$10,000.00, but we would have to trust him for it. I immediately called up Mr. Carstens, and he said to have Mr. Fagerberg come to Tacoma, and he went to Tacoma the next day. What they did I really could not say, as I was not present.

Q. Do you know whether or not he ever paid Mr. Carstens anything, or paid the Carstens Packing Company anything, for the Chititu store that was delivered to him in 1907?

Plaintiff objects to this question on the ground

(Deposition of W. C. Prater.)

that it is not within the issues joined in this suit, and not binding on the plaintiff, and incompetent, irrelevant and immaterial. Objection overruled. Plaintiff allowed an exception. [263—245]

A. Not one cent.

Q. I hand you what purports to be a statement of account for the J. A. Fagerberg store at McCarthy, Alaska, from the Carstens Packing Company, and would ask you to examine it and state what it is.

A. It is a statement of account against J. A. Fagerberg.

Q. State whether or not that account is a correct statement of the account between Fagerberg and the Carstens Packing Company for the time therein stated, to wit, from March 10th, 1914, to May 1st, 1914, inclusive.

A. It is, to the best of my knowledge.

Q. Has any part of it been paid? A. No.

Q. The whole amount named therein is now due from Fagerberg to the Carstens Packing Company?

A. It is.

Q. What amount is shown to be due by that statement from Fagerberg to the Carstens Packing Company? A. \$4,022.75.

Defendants offer statement in evidence, marked exhibit "A." Objected to by plaintiff as not binding on the plaintiff in this action, as no evidence shows that the plaintiff herein is in any way responsible for the bill of goods set out in the statement offered.

By the COURT.—It is not claimed by the plaintiff here that it was property assigned to him?

(Deposition of W. C. Prater.)

Mr. DIMOND.—No.

Objection overruled. Plaintiff allowed an exception.

Exhibit “A,” attached to the deposition, reads as follows:

[Exhibit “A” to Deposition of W. C. Prater.]

Mr. J. A. Fagerberg,

McCarthy, Alaska.

Debtor to

CARSTENS PACKING COMPANY,

Tacoma, Wash. [264—246] July, 1914.

1914.

March 10.	Draft for freight paid at Tacoma.....	1506.15
March 19.	Merchandise from West Coast Gro. Co., Tacoma.....	225.32
March 19.	Merchandise from Tacoma Grocery Co., Tacoma.....	234.23
March 19.	Merchandise from Northwest Gro. Co.,.....	131.18
March 19.	Freight from Tacoma to McCarthy....	276.23
March 19.	5% Buying charge Tacoma....	29.54
March 10.	Meat & Provisions from C. P. Co. from Seattle....	324.20
March 20.	Meat & Provisions from C. P. Co. from Seattle.....	576.03
March 21.	Freight paid on Meat, etc., from Seattle	119.59
Apr. 17.	Meat received from L. A. Brown agt. C. P. Co.....	198.78

(Deposition of W. C. Prater.)

Apr.	17.	Freight paid on shipment Apr. 17 from Seattle.....	67.60
May	6.	Meat & Provisions recd. from L. A. Brown, agt. for C. P. Co.	240.45
May	29.	Meat & Provisions recd. from L. A. Brown, agt. for C. P. Co... ..	127.94
June	12.	Meat & Provisions recd. from L. A. Brown, agt. for C. P. Co.	78.74
May	1.	Oil, Flour & Cheese recd. from L. A. Brown, agt. for C. P. Co.	34.99
			<hr/> 4170.97

CREDITS.

Apr.	20.	Paid to Seattle House C. P. Co.	105.00
		By cash to L. A. Brown, Agent.	25.00
May	1.	By 7 slabs bacon 74 3/8 at 24 1/2¢ per lb.....	18.22
			<hr/> 4022.75

This statement made by Mr. Wilt and accepted by Mr. Fagerberg.

Q. When you sent the bill of goods described in that statement to Fagerberg, did you know whether or not H. M. Fagerberg and J. A. Fagerberg were partners? A. I understood they were.

Plaintiff moves to strike this answer, as calling for a conclusion of the witness, and not stating a fact.

(Deposition of W. C. Prater.)

By the COURT.—I think the answer should be stricken out.

Defendants allowed an exception to the ruling.

Q. Well, did you have any evidence or have you learned since of any facts which lead you to believe that they were partners during all of the time that J. A. Fagerberg was in business at Chititu and Blackwell?

Plaintiff objects to this question on the ground that an answer in the affirmative would be a positive and complete contradiction to defendants' answer in which it is set out that Carstens Packing Company had no knowledge of the alleged copartnership [265—247] existing between J. A. and H. M. Fagerberg until some time subsequent to the 31st day of July, 1914.

Objection overruled. Plaintiff allowed an exception.

Q. Answer the question if you can.

A. I answered it—that personally I understood they were working together.

Plaintiff moves to strike as stating a conclusion of the witness and not a fact.

Motion sustained—answer stricken. Defendants allowed an exception to the ruling.

Q. Why was it that you billed the goods to J. A. Fagerberg and not Fagerberg Brothers?

A. Simply because the account was started that way years ago, and was never changed.

Q. Did J. A. Fagerberg state to you at the time that the Nizina Trading Company was turned over

(Deposition of W. C. Prater.)

to him, as follows: "I will take hold of the store as a personal favor for you, and see what I can do with it, but I won't guarantee that I can bring you one red cent out of this stock; I will not be responsible myself." Did he ever make such a statement to you, or its substance?

A. Nothing whatever, as I had nothing whatever to do with the turning over of the stock.

Q. When J. A. Fagerberg had the conversation with you on the 15th day of July, 1913, with reference to the transfer of his property in Alaska to you, did he state, "I want you to take care of Harry and I will give you a bill of sale for the works up there," and you said "Nothing doing," to which he said, "All right, I will give it to Harry then, and that settles it"?

Plaintiff objects to this question on the ground that it is leading, and on the further ground that it is in no way binding [266—248] upon the plaintiff in this case, and third, that the testimony from which counsel is reading is not testimony in this case, and therefore cannot be used for impeaching witness.

Objection overruled. Plaintiff allowed an exception.

A. He made no such statement.

Q. Did he say anything at that time about your protecting Harry in any way in connection with the issuance of the bill of sale to you?

A. No, sir, he did not.

Q. Is there anything else you desire to state with reference to this matter at this time, Mr. Prater?

(Deposition of W. C. Prater.)

A. I cannot recall anything just now.

Plaintiff moves to strike the entire testimony of this witness as incompetent, irrelevant and immaterial, and has not force in any way to bind the plaintiff in this action.

Objection overruled. Plaintiff allowed an exception.

Cross-examination.

(By T. J. DONOHOE, Attorney for Plaintiff.)

Q. Mr. Prater, when did you first become acquainted with J. A. Fagerberg?

A. About ten years ago, or something like that.

Q. Have you at any time met the plaintiff in this action, H. M. Fagerberg?

A. Not to my knowledge.

Q. You never had any conversation with him at any time in regard to the business out of which this suit has grown?

A. I have never met him, therefore have had no such conversation.

Q. How was this account carried on the books of the Carstens Packing Company?

A. J. A. Fagerberg. [267—249]

Q. How were the various goods shipped—in whose name? A. His name.

Q. J. A. Fagerberg's name? A. Yes.

Q. In February, 1913, the Carstens Packing Company commenced a suit against J. A. Fagerberg in King County, Washington, and recovered a judgment against him for \$2600.00, did it not?

A. Yes, sir.

(Deposition of W. C. Prater.)

Q. That suit was brought in the name of J. A. Fagerberg? A. Yes.

Q. Individually; H. M. Fagerberg of Fagerberg Brothers did not appear in the suit? A. No, sir.

Q. When was that stock of goods taken over from the Carstens Packing Company by J. A. Fagerberg—the stock of goods at Chititu?

A. August 12, 1907, it was inventoried.

Q. That is the time he took possession of it, so far as you know?

A. I have never been in that section of Alaska. It is the time so far as I know.

Q. Is it not a fact that when Fagerberg took over that stock of goods—J. A. Fagerberg—that he was authorized to do the best he could with the store, and there was no set figure as to the division of the profits, if there was any, between the Carstens Packing Company and J. A. Fagerberg?

A. He never had any such instructions from me.

Q. Did he do all the business with you?

A. With me or Mr. Carstens or Mr. Meyer.

Q. Herman Meyer?

A. Yes—or with Mr. Rines. He was our auditor at that time.

Q. What were the terms, so far as you know, under which J. A. Fagerberg took over the store at Chititu?
[268—250]

A. Now, my understanding was that he took over the store under the same terms as Alex. Wilson, whom he succeeded, had it.

Q. But that does not give us any information.

(Deposition of W. C. Prater.)

What were the terms he took it over on—under what terms did Mr. Wilson have it?

A. Mr. Wilson was to get a salary of \$1,500.00 a year, and he was to sell the goods and report to us.

Q. How often was he to report?

A. As often as was convenient; he usually reported every six months, or about that.

Q. You were with the Carstens Packing Company during the year ending July or August, 1907?

A. Yes.

Q. Mr. Wilson reported to you during that year, in August, 1907?

A. He turned the goods over on August 12th.

Q. Did he report for the year ending August 12, 1907? A. As soon as he got out he reported.

Q. Is it not a fact that Mr. Wilson decided that he could not take in money enough out of that store to pay his salary?

A. I could not say as to that; but Mr. Wilson is here and can testify himself.

Q. You, as treasurer of the Carstens Company, do you not know that you had to issue a check to pay Wilson's salary or a part of it, at that time?

Defendants object to any testimony concerning what Mr. Wilson made out of the business, as incompetent, irrelevant and immaterial and not cross-examination.

Objection overruled. Defendants allowed an exception.

A. I have no recollection of issuing such a check.

Q. Now, when did Mr. Fagerberg make the first

(Deposition of W. C. Prater.)

report to your company? [269—251]

A. He never reported in writing.

Q. When did he make his first report?

A. The first time he was out.

Q. Did he report to you?

A. He talked the matter over with me, Mr. Carstens and Mr. Rines; he did most of the business as to the account—he talked with Mr. Rines, the auditor.

Q. Where is Mr. Rines now?

A. He is up in Victoria.

Q. And he continued from August 12, 1907, to handle that store, for how long?

A. I think he is still handling it, what there is left of it.

Q. When you obtained the judgment against J. A. Fagerberg in the spring of 1913 for \$2,600.00, was that a complete settlement of what J. A. Fagerberg at that time owed the Carstens Packing Company?

A. That is what he owed the Carstens Packing Company. The Nizina Trading Company was a separate corporation, but I think they allowed the corporation to die a natural death; it was not the property of the Carstens Packing Company, but of Thomas Carstens.

Q. But I understand that this business the Nizina Trading Company had—or Carstens and Meyer—was never the property of the Carstens Packing Company?

A. It belonged to Carstens and Meyer, but I think Meyer turned it all over to Carstens. I would say in

(Deposition of W. C. Prater.)

regard to that judgment, that the suit was brought at the request of Mr. Fagerberg, for the purpose of trying to set aside a deed to a piece of property he had deeded to his wife, in Seattle, deeded to her to defeat his creditors.

Q. To begin back again, Mr. Prater; the Carstens Packing Company, [270—252] a corporation, has never been the owner of the store and stock of goods at Chititu? A. It never has.

Q. Now, to make that clear: the stock of goods that was turned over to J. A. Fagerberg on August 12th, 1907, was not then and never has been the property of the Carstens Packing Company?

A. No, sir, but it owed the Carstens Packing Company more than the stock of goods was worth.

Plaintiff at this time moves to strike all the testimony regarding the stock of goods at Chititu Creek, and the turning over of it to J. A. Fagerberg, on the ground that the Carstens Packing Company has never had any ownership of these goods, and were never the owners, and were not the parties who turned the goods over to J. A. Fagerberg.

Motion denied. Plaintiff allowed an exception.

Q. Now, in the spring of 1913, you recovered a judgment against J. A. Fagerberg for what—what were these goods?

A. That was for cattle furnished him, and \$700.00 cash.

Q. By the Carstens Packing Company?

A. Yes.

Q. And the Carstens Packing Company obtained

(Deposition of W. C. Prater.)

judgment against him? A. Yes, sir.

Q. In the summer of 1913 your company, Carstens Packing Company, and J. A. Fagerberg, had some other transactions, did they not—regarding the purchase of a stock of goods to be sent up to Alaska?

A. In 1913?

Q. 1913 or 1914. A. In the spring of 1914.

Q. Now, that stock of goods that you sent in the spring of 1914, [271—253] to J. A. Fagerberg, amounted to something over \$4,000, did it not?

A. Yes.

Q. Now, what were the arrangements under which the Carstens Packing Company sold this stock of goods to J. A. Fagerberg?

A. I am not familiar with these arrangements; they were between Mr. Fagerberg, Mr. Carstens and Mr. Wilt.

Q. Do you know anything of a proposition regarding the organization of a corporation by Thomas Carstens and J. A. Fagerberg, to put in a trading station between Blackburn and the Shushana mining region?

A. I have no personal knowledge of it. I have heard that such an organization was proposed, but I was never present at any conversations regarding it.

Q. Is it not a fact that the Carstens Packing Company, or yourself, or Mr. Thomas Carstens, sent J. A. Fagerberg to Alaska in the fall of 1913 or early in 1914 to obtain from H. M. Fagerberg a redeed of bill of sale of your property, to be organized into a corporation, and H. M. Fagerberg was to receive

(Deposition of W. C. Prater.)

stock to the amount of \$7,000, for his interest in the business?

A. I could not say anything as to such an arrangement.

Q. You know nothing at all about that? A. No.

Q. Do you know, or did you learn through your position with the Carstens Packing Company that in 1913 S. Blum & Company held a mortgage on all of the property that was turned over to H. M. Fagerberg?

Defendants object on the ground that it is incompetent, irrelevant and immaterial, and not cross-examination.

Objection overruled. Defendants allowed an exception.

A. I heard he had some kind of a claim—I don't think he had a [272—254] mortgage, but the arrangement was that he was to receive the rents from the roadhouse to apply on what Fagerberg owed him. I never heard he had a mortgage.

Q. You knew there was a large indebtedness against this property when Harry Fagerberg took it over?

A. What property do you refer to?

Q. All the property that bill of sale and deeded to Harry Fagerberg in 1913?

A. I knew he owed Blum by his own statement, but how much I could not say.

Q. Now, when did you send Mr. Fagerberg to Alaska for the purpose of getting him to obtain

(Deposition of W. C. Prater.)

from H. M. Fagerberg a reconveyance of this property?

Q. We never sent him. We arranged to send him, but he did not go.

Q. He never went up there for that purpose at all?

A. Not to my knowledge.

Q. To whom of your company did Mr. Fagerberg talk over details? A. Mr. Wilt and Mr. Carstens.

Q. Then Mr. J. A. Fagerberg was mistaken when he testified in his bankruptcy proceedings that all his conversations had with reference to the business transaction with Carstens Packing Company was had with you? A. Beyond a doubt.

Q. Did you ever hear of a certain agreement entered into on the 22d day of March, 1914, between J. A. Fagerberg and H. M. Fagerberg and Thomas Carstens regarding the property that was attached last fall by the Carstens Packing Company?

A. I know nothing of such an agreement.

Q. You knew nothing of that—never heard of it?

A. No. [273—255]

Q. When was your last conversation with J. A. Fagerberg with reference to your Alaskan transactions?

A. My last conversation with him was the time he called me at the Rainier Club over the phone.

Q. What month and year was that?

A. In July or August, 1913.

Q. Now, previous to the sending of this last bill of goods amounting to something over \$4,000, to J. A. Fagerberg, the Carstens Packing Company had

(Deposition of W. C. Prater.)

actual knowledge, did they not, that this property had been transferred to H. M. Fagerberg by J. A. Fagerberg A. When was that?

Q. Previous to sending this last bill of goods sent between March and July, 1914?

A. We had his own statement to that effect.

Q. J. A. Fagerberg's statement that about a year previous to this time he had transferred all his Alaska property to H. M. Fagerberg? A. Yes.

Q. Is it not a fact that the reason you did not take the bill of sale of this property in the spring of 1913 from J. A. Fagerberg was because you knew that Blum had a \$6,000 mortgage on the property?

A. It was simply for the reason that J. A. Fagerberg did not owe me anything, and he did owe Thomas Carstens, and he should be the one to have the bill of sale, and he agreed to give it to Mr. Carstens.

Q. As trustee for the Carstens Packing Company?

A. To Mr. Carstens personally.

Q. He owed the Carstens Packing Company, did he not?

A. He owed the Carstens Packing Company at that time, and he also owed for the old Nizina store to Thomas Carstens. [274—256]

Q. How do you know he owed it to Thomas Carstens—how do you know that?

A. It was the Nizina Trading Company—it belonged to that corporation and Thomas Carstens and Henry Meyer were the stockholders

Q. Which of the officers of your corporation auth-

(Deposition of W. C. Prater.)

orized and directed the bringing of the suit in the Alaska Courts in the Third Division last July, entitled Carstens Packing Company against J. A. Fagerberg?

Objected to as irrelevant, incompetent and immaterial and not cross-examination.

Objection overruled. Defendants allowed an exception.

A. That matter was handled by Mr. Wilt, our attorney, acting on behalf of the company. I suppose he got his orders from Mr. Carstens.

Q. He got no orders from you?

A. Why, we might have talked the matter over, the same as any attorney would do.

Q. And Fagerberg Brothers and H. M. Fagerberg were not parties to that suit?

A. That I would not say. The records would show.

Witness excused.

(Signed) W. C. PRATER.

By the COURT.—Was there a deed from Herman Meyer or Thomas Carstens or the Nizina Trading Company to J. A. Fagerberg in 1907?

Mr. DONOHUE.—A bill of sale. [275—257]

By the COURT.—Was that introduced here in evidence?

Mr. DONOHUE.—I think so—we intended to introduce it.

Q. (By the COURT.) Was it recorded?

Mr. DIMOND.—Yes, sir; this is a certified copy—we will offer it in evidence now. I think all the

(Deposition of W. C. Prater.)

parties agree that this bill of sale was given at that time.

The bill of sale is admitted without objection, marked Plaintiff's Exhibit "I" and reads as follows:

Plaintiff's Exhibit "I" [Bill of Sale].

No. 5667.

KNOW ALL MEN BY THESE PRESENTS: That the Nizina Trading Company, a corporation organized under the laws of the State of Washington, the party of the first part, for and in consideration of the sum of One (1) Dollars lawful money of the United States of America, to us in hand paid by J. A. Fagerberg of Seattle, Washington, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey until the said party of the second part his executors, administrators and assigns;

All of the property, goods, wares and merchandise in and about its store buildings on Chititu Creek, Alaska; Also all of the goods, wares and merchandise stored at the Tonsina Bridge Road House with Jake Nafstedt, Tonsina post office, Alaska.

All of the above mentioned property now belonging to and being the property of the first party.

TO HAVE AND TO HOLD the same to the said party of the second part, his executors, administrators and assigns, forever. And — do — for — heirs, executors and administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and

chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, we have hereunto set our hand and seal the fifth day of June in the year of our Lord one thousand nine hundred and seven.

NIZINA TRADING COMPANY,

By HERMAN MEYER, (Seal)

Treasurer and Genl. Manager.

Signed, sealed and delivered in presence of
WALTER CARSTENS,
W. C. PRATER.

[276—258]

State of Washington,
County of King,—ss.

On this 5th day of July, A. D. 1907, before me, personally appeared Herman Meyer, known to me to be the treasurer and General manager of the —— Corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

LEROR V. NEWCOMB,

Notary Public in and for the State of Washington,
residing at Seattle.

The above instrument was filed for record at 10 o'clock A. M. July 22, 1907.

JOHN LYONS,
U. S. Commissioner.

Mr. LYONS.—I will now read the deposition of Alex Wilson.

[Deposition of Alex Wilson, for Defendant.]

Direct Examination of ALEX WILSON, Conducted
by THOMAS R. LYONS, Attorney for Defendants.

Q. State your name and place of residence?

A. Alex Wilson, 2304 First Avenue, Seattle.

Q. Did you at one time live in Alaska?

A. Yes, sir.

Q. You are acquainted with the Nizina Trading Company? A. Yes, sir.

Q. And with Thomas Carstens and Herman Meyer? A. Yes, sir.

Q. Are you familiar with the store that was owned and operated by the Nizina Trading Company at Chititu, Alaska? A. Yes, sir.

Q. What position did you hold under that company at one time?

A. Well, I run the store, general care taker, salesman, and all around man. [277—259]

Q. How long did you serve in that capacity with the Nizina Trading Company?

Plaintiff objects to any testimony being offered in this case regarding the store at Chititu, Alaska, for the reason that the secretary and treasurer of the Carstens Packing Company had admitted on the stand that Carstens Packing Company never at any

(Deposition of Alex Wilson.)

time had any ownership or interest in the Chititu, Alaska, store. Objection overruled. Plaintiff allowed an exception.

A. About four years, maybe nearly five.

Q. To whom did you turn the store over when you discontinued? A. To H. M. Fagerberg.

Q. Did you and H. M. Fagerberg take an inventory of what was in the store? A. Yes, sir.

Q. Can you state without referring to the inventory, what it inventoried at?

A. No, because I never looked at the thing for seven years until this morning.

Q. Who authorized you to turn the store over to H. M. Fagerberg? A. Herman Meyer.

Q. Which one of the Fagerberg Brothers did he authorize you to turn it over to?

A. J. A. Fagerberg.

Q. Then how did you happen to turn it over to H. M. Fagerberg?

A. He came out there with a note from J. A. Fagerberg, authorizing me to turn it over to him.

Q. When did you turn over the store and all the merchandise contained therein to Fagerberg?

A. It was in August, but I do not know when, of 1907.

Q. What arrangements did you have with the Nizina Trading Company in regard to compensation?
[278—260]

A. \$1,500.00 a year, \$100.00 during the winter and \$150.00 during the summer months.

Q. And you were to account to them for all sales

(Deposition of Alex Wilson.)

and disbursements made? A. Yes, sir.

Q. To the Nizina Trading Company?

A. Yes, sir.

Q. Now, *along the* other articles of merchandise that were in the store when you turned it over to Fagerberg, were there any furs there?

A. Yes, sir.

Q. Of what value were they?

A. They were of considerable value when I left there; furs were getting to be very valuable.

Q. What would you say the value of all the furs was? A. Not less than \$4,000.00.

Q. State what was the opportunity at that time to convert that property into cash.

A. None whatever, because we could not carry them out of that country at that time of the year, or I would have brought them out.

Q. Do you know whether or not these furs were brought out during that winter and sold?

A. I do not know.

Q. State whether or not you took any furs out with you from the Nizina Trading Company store, to Seattle? A. Yes.

Q. How many? A. A very few, five or six.

Cross-examination Conducted by Mr. T. J. DONOHOE, Attorney for the Plaintiff. [279—261]

(Read by Mr. DIMOND.)

Q. You were put in charge of that store by the Nizina Trading Company, were you? A. Yes.

Q. You made all reports to the Nizina Trading Company, did you not? A. Yes, to the manager.

(Deposition of Alex Wilson.)

Q. Herman Meyer? A. Yes.

Q. You took the store over in 1904, the next year after the rush?

A. It was in 1903 when the rush was, was it not? I took it in March, 1904. I thought first it was in 1903.

Q. Now, this inventory that you took—all these goods that were inventoried had been in there since 1903, had they not? A. Yes.

Q. It is true, is it not, that some of them were so severely damaged as to be almost worthless?

A. No. I have a list of all that were damaged when I turned the store over to Mr. Fagerberg.

Q. How did you arrive at the prices in that inventory?

A. Just Herman Meyer's prices, the cost price, and 33%, on what it cost to take the goods in—the original price, and 25% to bring them in, and 33% as profit in running a general store, that was the basis we figured on.

Q. You put the original price on the goods, plus the freight to Valdez, plus 25% transportation in to Chititu, plus 33% profits, was that it?

A. Yes, about that.

Q. Now, all of these goods at that time were four or five years old, were they not?

A. Some of them, not all. We took in quite a lot of goods the year I went in, and the next year Mr. Meyer brought in about \$3,000 worth. [280—262]

Q. Were any of these goods in the list you turned over to Fagerberg—had you not disposed of these

(Deposition of Alex Wilson.)

goods in the meantime? A. No.

Q. How much was left?

A. I could not tell you that.

Q. \$500.00 worth? A. Yes.

Q. Those furs you speak of, they belonged to the Nizina Trading Company, did they not? A. Yes.

Q. You say your salary was \$1,500.00 a year?

A. Yes.

Q. And what kind of a business did you do while there—a very profitable business?

A. That last year, of course, was a bad year, the creek was a little bit on the bum on account of water and nothing to do that season, and of course the store was not very profitable that season.

Q. Did you make any profit?

A. Not that year; the season before we made a fine profit.

Q. But that year you did not make any profit?

A. No, none whatever.

Q. That year there were not many operators—Kernan and Esterly were the only developing operators that year, were they not? A. Yes.

Q. Do you know, as a matter of fact, that there was no demand for goods after Fagerberg took the store over?

Objected to by defendants as irrelevant, incompetent and immaterial, and not cross-examination.

Objection overruled. Defendants allowed an exception.

A. Well, after I left Esterly ran short of goods, just during [281—263] that time—a few days be-

(Deposition of Alex Wilson.)

fore I left—after I had delivered the store over to Fagerberg, Esterly got short of goods, and he had to have milk and other things amounting to \$250.00, that he sold at once.

Q. Do you think he kept up that lick during the remainder of the season? A. I do not know.

Q. Now, Esterly and Kernan had been in the habit of taking up whatever outfit and provisions they thought would last them the season, had they not?

A. Yes.

Q. You brought out some of the furs you speak of and sold them to make up the balance of your salary for that year?

A. Yes, to the Nizina Trading Company.

Q. You did not do business enough that year to make up your salary? A. No.

Q. And these furs belonged to the Nizina Trading Company that you delivered to J. A. Fagerberg?

A. Yes.

Witness excused.

Mr. LYONS.—I will now read the deposition of Thomas Carstens.

[Deposition of Thomas Carstens, for Defendant.]

Direct Examination of THOMAS CARSTENS,
Conducted by THOMAS R. LYONS, Attorney
for the Defendants.

Q. State your name and place of residence?

A. Thomas Carstens, Tacoma, Washington.

Q. What relation do you bear to the Carstens Packing Company? A. I am its president.

Q. How long have you served in that capacity—

(Deposition of Thomas Carstens.)

as president of that company? A. For ten years.

[282—264]

Q. Now, are you acquainted with the company known as the Nizina Trading Company? A. Yes.

Q. You were one of the stockholders in the Nizina Trading Company? (Plaintiff at this time objects to all the testimony of this witness regarding the Nizina Trading Company or the store at Chititu owned by the Nizina Trading Company, for the reason that the Nizina Trading Company is not in any way a party to this litigation, as the testimony of Mr. Prater, one of the witnesses herein, shows that the property of the Nizina Trading Company at Chititu was never owned by the Carstens Packing Company.)

Objection overruled. Plaintiff allowed an exception.

A. Yes, myself and Herman Meyer.

Q. Were you and Mr. Meyer all of the stockholders of that company during all of the time of its existence?

A. Yes. I say yes, yet there might have been other stockholders holding one share, to make the company, I could not say just now, but Mr. Meyer and myself owned substantially all of the stock.

Q. That company owned the store at Chititu, Alaska, did it not? A. Yes.

Q. What disposition did you make of that store and the merchandise contained therein?

A. I gave a bill of sale to Al Fagerberg.

Q. That is J. A. Fagerberg?

(Deposition of Thomas Carstens.)

A. Yes, J. A. Fagerberg, about eight years ago.

Q. What arrangements did you make with J. A. Fagerberg at that time?

A. We did not get along well up there, so I executed to him a bill of sale without a consideration. He was to continue to run [283—265] the store and pay us for the inventory as soon as he was able.

Q. What arrangements were made with respect to any salary he was to receive, or was he to receive any?

A. There was nothing said at that time about it. He and his brother had been running the store for several years.

Plaintiffs object to this answer as not responsive to the question, and not binding on H. M. Fagerberg, as it is not shown that he was present.

By the COURT.—The last part of the answer may be stricken out as not responsive to the question.

Defendants allowed an exception to the ruling.

Q. You say he and his brother had been running the store—you mean H. M. Fagerberg?

A. Yes, A. J. Fagerberg and Harry Fagerberg.

Q. Harry is H. M. Fagerberg, is he not?

A. Yes I kept after Fagerberg for several years to render a settlement which he promised to make, but he never did, so finally, I believe it was in 1911, or about that time, I made a settlement in which Fagerberg and myself agreed on \$10,000.00.

Q. That is, he was to pay the Nizina Trading Company \$10,000.00 for that store and the stock of goods therein contained at Chititu?

(Deposition of Thomas Carstens.)

A. He was to pay \$10,000.00 for the stock of goods in the store at Chititu, yes.

Q. Did he ever pay you that \$10,000.00 or any part of it? A. Nothing.

Q. Did he pay the Nizina Trading Company or any of its officers any money for the store?

A. He never did.

Q. You were also, you stated, president of the Carstens Packing Company? A. Yes. [284—266]

Q. You had some dealings with J. A. Fagerberg or Fagerberg Brothers as president of that company, did you not?

A. Yes—for about ten years I have been dealing with them.

Q. Now, in July of 1913, did you have any conversation with J. A. Fagerberg with reference to a certain bill of sale that he had made to his brother, H. M. Fagerberg, giving to the latter all his property in Alaska? A. Yes.

Q. When and where was such conversation had?

A. At Seattle and Tacoma.

Q. With reference to the conversation held at Tacoma, who was present when you had that conversation with him?

A. Mr. Wilt and I believe Mr. Meyer, and Mr. Fagerberg—J. A. Fagerberg.

Q. Was Mr. Prater there?

A. Not in Tacoma—he was present at several conversations in Seattle, if I remember right.

Q. To refresh your memory. I would ask you to recall that Mr. Prater brought or went with Mr.

(|Deposition of Thomas Carstens.)

Fagerberg and his brother-in-law, M. Custer, over to your place of business in Tacoma?

A. Yes, I remember now, he was there.

Q. You remember now that Mr. Prater was also present at that conversation you had with Mr. Fagerberg at Tacoma? A. Yes, I remember now.

Q. State the substance of the conversation that took place between you and Mr. Fagerberg at that time?

Plaintiff objects to this question at this time for the reason that it is shown that H. M. Fagerberg was not present; it is also shown that J. A. Fagerberg had parted with his title to the property at the date this conversation is alleged to have taken [285—267] place, and he was therefore unable to bind his vendee by any statements of his own.

Objection overruled. Plaintiff allowed an exception.

A. J. A. Fagerberg was in trouble—getting a divorce from his wife—and fearing he would lose out he wanted to turn all the property belonging to him and his brother over to me for what he owed me. At the time he first offered it to Mr. Prater Mr. Fagerberg told me Mr. Prater refused to take the bill of sale, and then he turned the property over to his brother, H. M. Fagerberg, and he thought his brother would no doubt be willing to turn the property back to me if he asked him to. We thought of sending him to Alaska, and Mr. Wilt would go with him, for the purpose of having this property turned back to me. This, however, failed.

(Deposition of Thomas Carstens.)

Q. Did Mr. J. A. Fagerberg state at that time why he had made that conveyance to his brother?

Objected to by plaintiff on the ground that the question is leading.

(No answer to the question.)

Q. State the reason he assigned for so conveying?

A. The reason he gave for assigning the property to his brother was on account of trouble he was having with his wife; at that time he had a divorce suit pending, and he feared his wife would attach his property and he wanted to turn it over to us, and as Mr. Prater refused to take it, he turned it over to his brother.

Q. You say you had another conversation with him in Seattle? A. Several of them.

Q. Who was present at the first conversation you had with him in Seattle?

A. I think Mr. Prater was there, and I think Mr. Wilt was, as [286—268] Mr. Wilt is usually with me when we make these settlements.

Q. What conversation did you have with Mr. Fagerberg at that time?

Plaintiff objects on the ground that plaintiff in this case is in no way bound by statements made by J. A. Fagerberg in this conversation because it is shown that H. M. Fagerberg was not present, and J. A. Fagerberg had previously transferred this property to H. M. Fagerberg, and therefore cannot bind his vendee by his statement.

Objection overruled. Plaintiff allowed an exception.

(|Deposition of Thomas Carstens.)

A. Along the same lines—that he wanted to turn the property over to me instead of his brother, for the reason that he owed me.

Q. Do you mean the Carstens Packing Company or yourself?

A. I mean the Carstens Packing Company.

Q. At this time J. A. Fagerberg or Fagerberg Brothers were indebted to you personally, as well as the Carstens Packing Company, were they not?

A. Yes.

Q. Now, that last conversation that *he* have detailed, in Seattle, about what time was that?

A. In August of 1914 (should be 1913—B. A. N.).

Q. Did you have any other conversation with him subsequent to that time about this matter?

A. In Tacoma, in the spring of 1914.

Q. What was the substance of that conversation you had with him in the spring of 1914?

Same objection as last previously offered, is made by plaintiff.

Objection overruled. Plaintiff allowed an exception.

A. He wanted to go back to Alaska after he got his divorce, wanted further credit, which I could not give him. Later on he again asked me for credit, which I said I could not give him, [287—269] but I then promised to let him have a couple of hundred dollars worth of meat. He and his brother wanted to run a sawmill and I allowed him this shipment of meat, and that is as far as I would go. Later on, without any further asking or writing, he drew on

(Deposition of Thomas Carstens.)

us for about \$1,500.00, freight on some hay and grain that was shipped. Thinking it would put the fellow out pretty bad if I did not pay it, I paid it, although I had not promised to help him out any further. Then he followed this up by sending several orders down for groceries and meat, which I also bought for him and paid for and sent to him. In a letter about that time he agreed to come down by May 1st, and again July 1st, to make some sort of a settlement. Among other things he agreed to, or offered to start a company made up of myself, himself and his brother, but my answer was that I would not do anything, but if he came down I might do something along those lines; I might do something if he came down, if we could make satisfactory arrangements, but he never came. When further orders came from him for groceries and meat, I sent them on to a man by the name of Brown, whom I had sent up there in the meantime to look after our interests. Some of these orders Brown turned over to Fagerberg; some of them he sold himself. And that is about the whole of our transaction.

Q. Well, when you paid the draft in March of 1914, and shipped good wares and merchandise from March, 1910 (1914—B. A. N.) to May, 1910 (1914—B. A. N.), did you intend to send them to J. A. Fagerberg or to Fagerberg Brothers?

Plaintiff objects to this question as very, very leading, and not the best evidence, as the consignment itself is the best evidence, as the shipping bill would show to whom they were sent. Objection overruled.

(|Deposition of Thomas Carstens.)

Plaintiff allowed an exeption. [288—270]

A. All the business was done from the conversations I had with J. A. Fagerberg, but it was conducted in the name of Fagerberg Brothers, although I had never seen Harry Fagerberg.

Plaintiff moves to strike this answer as not responsive to the question.

Motion denied. Plaintiff allowed an exeption.

A. My business had been transacted with J. A. Fagerberg.

Q. State why you billed the goods to J. A. Fagerberg, if you understood Fagerberg Brothers were doing business as partners?

A. I done all my business with J. A. Fagerberg for the last ten years, not being acquainted with his brother, so I sold and billed everything to him.

Q. The Carstens Packing Company has not been paid for any of the goods, wares and merchandise that you forwarded to Fagerberg Brothers in 1914?

A. Nothing has been paid that I know of—there may be a small credit, I cannot state exactly—there may be a couple of hundred dollars.

Q. All the remainder of the bill is unpaid?

A. Yes

Q. And the draft that you paid in March, 1910 (1914—B. A. N.), has that been paid?

A. No part of it.

Q. Did Mr. Fagerberg have any conversation with you over the telephone, while he was in Seattle and you were in Tacoma, with reference to request he made on you to guarantee to pay any alimony his

(Deposition of Thomas Carstens.)

wife might collect from him when he got back to Alaska?

Plaintiff objects to this question as not belonging to any of the issues joined in this action, and as incompetent, irrelevant and immaterial. [289—271]

Objection overruled. Plaintiff allowed an exception.

A. I remember some talk, but I don't remember now just what the exact talk was.

Q. To refresh your memory; do you recall that Mr. Fagerberg was to go to Alaska to procure a reconveyance from his brother of all the property he had conveyed to his brother, to you, and that when he came to Seattle, just before leaving for Alaska, he called up over long distance telephone, and requested that you guarantee to pay any alimony his wife might collect from him in Alaska?

Plaintiff objects to this question as not within the issues of this case, and cannot in any way bind the plaintiff in this action.

Objection overruled. Plaintiff allowed an exception.

A. I remember such a telephone conversation, but I cannot give the details.

The reading the direct examination being finished, court took a recess to 2 P. M.

AFTERNOON SESSION.

Mr. RITCHIE.—Before proceeding further with the testimony in this case, I desire to ask leave to amend the amended answer filed by the defendants,

(Deposition of Thomas Carstens.)

as per printed motion which I have filed with the clerk.

Mr. DIMOND.—I object to the proposed amendment on the ground that it is improper and has no proper place in the pleadings and on the second ground that the last clause in it contains a conclusion. It is all in the record, as Mr. Ritchie has testified.

Mr. RITCHIE.—This is only done to make the pleadings conform to the proof.

By the COURT.—I prefer not to pass on this matter just at present, but I will do so before the matter is submitted to the jury. [290—272]

Mr. Dimond reads the cross-examination of Thomas Carstens.

Cross-examination.

(Conducted by T. J. DONOHOE, Attorney for Plaintiff.)

Q. Mr. Carstens, that store at Chititu was the property of the Nizina Trading Company, was it not? A. Yes.

Q. And the Nizina Trading Company executed the bill of sale of that store that was made to J. A. Fagerberg? A. Yes.

Q. And J. A. Fagerberg went into possession of that store under arrangements with the Nizina Trading Company? A. Yes.

Q. And he was accountable to the Nizina Trading Company, was he not? A. Or rather to me.

Q. To you personally?

(Deposition of Thomas Carstens.)

A. Yes. The Nizina Trading Company owned the store, but owed me more than the assets of the company.

Q. Getting back to the Nizina Trading Company, was it not true that J. D. ——— and Robert Blie were at one time connected with that company? Were they not in the original organization of the company in 1901-2-3, when the company was formed?

A. I don't remember whether they were or not. I believe we sold them goods from the store, for which we never were paid.

Q. Now, you spoke of Fagerberg going to Alaska, J. A. Fagerberg, in 1914. What was the arrangement between you and him when he went there in 1914?

A. There was no arrangement at all other than I agreed to let him have as high as \$200.00 worth of meat, which he was to use there.

Q. Now, previous to going to Alaska, he had asked you for credit? A. Yes. [291—273]

Q. How much?

A. He wanted me to help him, for several thousand dollars.

Q. And you refused twice to let him have credit?

A. Yes, several times.

Q. You did agree, however, to let him have about \$200.00 worth of meat? A. Yes.

Q. Now, then, as I understand it, Fagerberg made two requests to you for credit, and you turned them both down but \$200.00 worth of meat, and that was

(Deposition of Thomas Carstens.)

the condition of the transaction when Fagerberg went to Alaska in 1914? A. Yes.

Q. And then, without any further transaction between you, he drew on you for about \$1,500.00, and you paid it? A. Yes.

Q. And he sent you orders for about \$2,800.00 worth of goods, and you furnished them to him, did you? A. Yes.

Q. And you furnished them when that was the condition of the transaction between you?

A. I received a letter from him saying he would come down about the first of May and arrange a settlement.

Q. And that was the condition of the transaction when you advanced him \$1,500 in cash, and sold him between \$2,500 and \$3,000 worth of goods?

A. Yes.

Q. And he made no arrangements with you for forming a corporation?

A. There may have been some talk, but I turned them all down.

Q. Is it not a fact that when Fagerberg went to Alaska you had an arrangement that he was to purchase back or get back a transfer [292—274] of the business that stands in his brother's name, that Al. Fagerberg was to get \$10,000 worth of the capital stock in the corporation that was to be formed, for his time, and Harry Fagerberg was to get \$7,000 worth of the capital stock for this business which he was to turn back, and you were to get the balance of the stock?

(Deposition of Thomas Carstens.)

A. I believe that is the proposition he made to me after he got up there.

Q. But you had no such arrangement when he went? A. No.

Q. You had no arrangement that he was to make arrangements with H. M. Fagerberg—that he was to get back the property?

A. He made several propositions to me.

Q. And you turned all of them down?

A. Yes, until he would come back from Alaska with a proposition that would suit me.

Q. Now, notwithstanding that, you advanced him, in money and goods, about \$4,000 after he left here?

A. Yes, that is where I made my mistake. But I decided to help him out, thinking he would appreciate it and pay me, but he failed to even come down as he wrote he would.

Q. On the books of the Carstens Packing Company this account was always carried in the name of J. A. Fagerberg, was it not? A. Yes.

Q. You had no correspondence with H. M. Fagerberg at all?

A. No; he was the working end of the business there in Alaska, and J. A. Fagerberg came down each year and bought cattle.

Q. How do know that H. M. Fagerberg was the working end of the business?

A. He told me so many times.

Q. Who told you? [293—275]

A. J. A. Fagerberg.

Q. A good portion of this time he was not work-

(Deposition of Thomas Carstens.)

ing for the Carstens Packing Company—he was running the store for the Nizina Trading Company, most of the time, was he not?

A. Harry Fagerberg was running the Chititu store with Al, but nearly all of my dealings were with J. A.

Q. When did you first know of the Fagerberg Brothers as a partnership?

A. About ten years ago; all I know is what Al told me, that his brother was up there and they were working together.

Q. Did he say his brother was a partner?

A. Yes.

Q. And you knew of this ten years ago?

A. Yes.

Q. During all of these years you knew that J. A. Fagerberg and H. M. Fagerberg were partners in Alaska? A. From what J. A. told me.

Q. Now, notwithstanding that, you carried the account in the name of J. A. Fagerberg?

A. Yes, sir.

Q. Notwithstanding that you sued J. A. Fagerberg for an indebtedness that he owed, and secured a judgment? A. Yes.

Q. And he did not include H. M. Fagerberg?

A. No.

Q. And you looked personally to J. A. for payment? A. Yes.

Q. And did not look to Fagerberg Brothers, in advancing this credit, but, knowing that Harry Fagerberg was connected with J. A. Fagerberg, the

(Deposition of Thomas Carstens.)

bills were made out in the name of J. A. Fagerberg, and you did not look to H. M. Fagerberg or the alleged [294—276] partnership for payment, but to J. A. Fagerberg? A. To J. A. Fagerberg.

Q. And you never advanced any credit to the alleged partnership of Fagerberg Brothers?

A. Yes, J. A. Fagerberg told me his brother was working with him, keeping store with him, what was his was his brother's, and what was his brother's was his, they were working together?

Q. Notwithstanding that, in July of 1914 you started a suit in Alaska entitled Carstens Packing Company vs. J. A. Fagerberg, not including H. M. Fagerberg or Fagerberg Brothers?

A. My understanding was that we were to sue Fagerberg Brothers. Mr. Wilt handled this matter.

Q. Did you so instruct Mr. Wilt? A. Yes.

Q. Was Mr. Wilt in Alaska last year? A. Yes.

Q. Was he there when this suit was commenced?

A. I believe so.

Q. Did he make the arrangements for the commencement of the suit? A. Yes.

Q. And he has been attorney for Carstens Packing Company for some years? A. For two years.

Q. That is the only business he attends to?

A. Yes.

Q. And you instructed him to bring suit in the name of Fagerberg Brothers? A. Yes.

Q. Do you know whether he did or not?

A. I understand since that he did not. I have learned of that [295—277] lately. I did not

(Deposition of Thomas Carstens.)

know—I left it all with him.

Q. I see the Carstens Packing Company has filed an amendment to its answer in case of H. M. Fagerberg vs. the United States Marshal of the Third Division, in substance as follows: That at the time of the commencement of said action of Carstens Packing Company vs. J. A. Fagerberg, the plaintiff in said action was not aware that the plaintiff herein, H. M. Fagerberg, and the said J. A. Fagerberg, were partners. How do you explain that in your Answer, that you did not know they were partners up to July 31, 1914?

A. I know I told Mr. Wilt to bring suit against the brothers, as I stated before. I don't know why he sued J. A. alone. Mr. Wilt is not in town, he is in the East, and I did not know until to-day that the suit was brought in the name of J. A. Fagerberg alone.

Q. And when you paid the \$1,500 draft and sent him these goods in 1914, which amounted to something over \$4,000, you at that time had personal knowledge that all the business stood in the name of H. M. Fagerberg, did you not?

A. No, I heard they were partners, working together.

Q. Did you not know that J. A. Fagerberg had executed a bill of sale to H. M. Fagerberg the year previous?

A. I am not sure that J. A. made a bill of sale to his brother of the Chititu store or his business.

Q. Do you not remember that in the spring of 1913

(Deposition of Thomas Carstens.)

J. A. Fagerberg wanted to make a bill of sale, of what he terms the whole works, to Carstens Packing Company, or to you? A. Yes.

Q. Was not the condition of making such a bill of sale that the Carstens Packing Company was to pay the back salary of \$4,500 to H. M. Fagerberg?

[296—278]

A. Not that I know of.

Q. What were the conditions that J. A. Fagerberg offered to make that bill of sale for?

A. I do not recollect. I do remember that there was some consideration he wanted to make his brother, in order to get him to turn it all back.

Q. But when he offered to deed it to you or the Carstens Packing Company, what were the conditions?

A. I don't remember just now, but I remember there was an amount he wanted to pay his brother, in order to leave his brother out of the transaction and turn the property over to me.

Q. Now, he was ready to turn the property over to you if you would pay his brother a certain amount of money, is that right? A. I believe that is it.

Q. And you refused? A. I believe I did.

Q. And that is the reason he did not make the bill of sale at that time?

A. It was something that came up—I don't remember.

Q. But you remember his making such a demand?

A. I believe there was something like that.

Q. Did that take place in the conversation in Se-

(Deposition of Thomas Carstens.)

attle or Tacoma, that you have testified regarding?

A. I don't quite remember—one of these places.

Q. Now, in regard to this partnership, Mr. Carstens, have you at any time, or has your company at any time, either in conversations or by letter, had any acknowledgment from H. M. Fagerberg that he was a copartner with J. A. Fagerberg during the time of these transactions?

A. All of our dealings were with J. A. Fagerberg, and all I know is what he told me from time to time during the past six or [297—279] eight years.

Q. You have never met H. M. Fagerberg?

A. I do not know him at all, all our dealings were with J. A.

Q. Now, is it not a fact that the reason you and J. A. Fagerberg did not form a corporation in the year 1914, for trading purposes was because you wanted to put in the Nizina store—the remainder of the Nizina Trading Company's stock—at \$10,000 and J. A. Fagerberg would not accept it at that price?

A. No, I don't think that was it.

Q. You remember such a question coming up?

A. A proposition was made to me by letter which was not acceptable to me.

Q. Have you that letter?

A. I can get it, or I am pretty sure I can. Anyway, he promised to come down here, which he never did, and so no transaction was ever made.

Q. Did you have some such conversation before he went north?

A. Perhaps we had some such conversation. I

(Deposition of Thomas Carstens.)

don't remember the details of it. Now, my talk with him was that I wanted the security for what he owed us, and getting that I might go in with him on some deal to help him out and put him on his feet, that is the long and short of it. I remember getting a letter from him saying what he will do, and if I remember right, I answered him. I believe I can produce this letter and the answer if you want them, showing exactly what was done. I told him nothing could be done until he came down, and he never came.

Q. Mr. Carstens, your last conversation with J. A. Fagerberg before he went north in the spring of 1914 was that he was to go up there and get security for what he owed the Carstens Packing Company—security for something like \$2,600—a judgment which [298—280] you had against him at that time, was it not? A. He owed me \$10,000.

Q. Did not owe the Carstens Packing Company?

A. No, but he owed me.

Q. Now, notwithstanding the fact that you wanted security for that amount, you advanced him another line of credit of about \$4,000 after he went to Alaska?

A. We did not advance it to him, but he took the liberty of drawing on me and sent down orders and not wishing to discommode him I paid the draft and sent the goods to him, thinking he would reimburse me, and he promised to do so, but he never has.

Q. Although you wanted security before you dealt further with him, still after he got up there you advanced him goods and merchandise, and paid his draft?

(Deposition of Thomas Carstens.)

A. By paying his draft and sending his grocery orders, I thought I could make him ashamed, and that he would deal honest with me and remember his friend.

Q. Well, when was this letter written that you speak of?

A. That was after he went up there in the spring.

Q. About what month?

A. I think March or April, along there.

Q. When did you send Mr. Wilt up there to check him up?

A. That must have been in July, I think. That was after I heard he said he had no intention of coming down.

Q. Did he state when he could come down, or did you state when you wanted him?

A. Well, he made talk up there that he did not intend to come down.

Q. And that talk was carried to you? A. Yes.

Q. The Carstens Packing Company have never at any time had any [299—281] direct business transactions with H. M. Fagerberg, have they?

A. Not direct, only through J. A.

Redirect Examination Conducted by Mr. THOMAS
R. LYONS, Attorney for the Defendants.

(Read by Mr. LYONS.)

Q. In response to one of counsel's questions, you stated that in the conversation which took place between yourself and J. A. Fagerberg, that he spoke something about Harry being paid something, in case he procured a conveyance from Harry of all of

(Deposition of Thomas Carstens.)

his property or all of the property of the partnership back to you or to the Carstens Packing Company. Now, was it stated at that time that Harry was to receive this money merely to get him out of the partnership, or that he was to have this money in consideration of anything else?

Plaintiff objects to this question as leading—witness should be asked to state the conversation.

Mr. LYONS.—We only want him to explain his statement to you.

Objection overruled. Plaintiff allowed an exception.

A. He was to have whatever amount was mentioned in order to have the property turned back to me and to keep him out of the partnership with his brother.

Q. Now, you stated in response to a question on cross-examination that you instructed your attorney, Mr. Wilt, to bring suit last summer on behalf of the Carstens Packing Company against Fagerberg Brothers. Do you happen to know as a matter of fact that Mr. Wilt went to Alaska and prepared a complaint, to be filed at Valdez, Alaska, wherein Carstens Packing Company was to be plaintiff, and Fagerberg Brothers, defendants, pursuant to your instructions?

Plaintiff objects to any testimony he does not know of his own knowledge. [300—282]

Objection overruled. Plaintiff allowed an exception.

A. Yes, that was my instructions; I am certain I

(Deposition of Thomas Carstens.)

told him to bring suit in the name of Carstens Packing Company against Fagerberg Brothers, and I believe I gave him a power of attorney to act for us, if I am not mistaken.

Q. In this case that counsel has called your attention to, you did not verify the Answer that was filed, did you? A. No, sir.

Q. The Answer in this case which states substantially that the Carstens Packing Company was not aware at the time said Answer was filed that a partnership existed between the two Fagerbergs, you yourself never saw that Answer until after it was signed by counsel in Alaska, did you? A. No.

Recross-examination Conducted by Mr. T. J. DONOHUE.

(Read by Mr. LYONS.)

Q. Mr. Carstens, in 1913, when J. A. Fagerberg was here and offered that bill of sale to you, for that property in Alaska, you knew then that S. Blum had a mortgage on that property for about \$6,000, did you not?

Defendants object to this line of testimony, for the reason that it is irrelevant, incompetent and immaterial, and not cross-examination.

Objection overruled. Defendants allowed an exception.

A. He told me he owed Blum, but he told me he was paying him off, or that his brother was paying him off, with rent from the property he had at McCarthy, and that he and his brother practically owed no bills when he left here a year ago.

(Deposition of Thomas Carstens.)

Q. Did not your agent, Mr. Wilt, notify you when he arrived in Alaska that H. M. Fagerberg had paid off the Blum indebtedness [301—283] during the year he owned the property under this transfer from Al?

Same objections made by defendants.

Objection overruled. Defendants allowed an exception.

A. I do not recollect.

Q. Did you know before you brought that suit in July, 1914, that the indebtedness owing to Blum had been cleaned up, that the property was clear?

A. Yes, I think so.

Q. Before you brought the last suit?

A. I am not sure about it, but I believe I heard something like that. Al Fagerberg told me a good many things that did not prove to be true; I don't know who told me, but I heard it.

Q. Al Fagerberg had been in Seattle and around Seattle the greater part of the year 1913 and up to the spring of 1914, had he not?

A. Around this part of the country.

Q. Not in Alaska? A. I don't think so.

Q. Then H. M. Fagerberg was managing the business from the time of the transfer to the time Al went back, was he not? A. I believe so, I don't know.

Redirect Examination Conducted by Mr. THOMAS

R. LYONS, Attorney for Defendants.

(Read by Mr. LYONS.)

Q. Did you have any conversation with Al Fagerberg with reference to his having leased certain

(Deposition of Thomas Carstens.)

property before he left there, and that the rent from the leased property was to go to pay up Blum's claim? A. Yes.

Q. Where did you have that conversation?

A. Why, both in Seattle and Tacoma.

Q. State the substance of these conversations?

[302—284]

A. I believe he told me the renter had instructions to pay the rent to Blum.

Q. The renter had orders?

A. The renter who rented the roadhouse was paying the rent to Blum instead of Fagerberg.

Q. Did he tell you who gave the renter authority to so pay the rent? A. I believe he did.

Re-recross-examination Conducted by T. J. DONOHOE, Attorney for the Plaintiff.

(Read by Mr. LYONS.)

Q. You knew in 1913 that Blum had a mortgage on the Blackburn property, did you not?

A. I knew they owed Blum, but I do not recollect about the mortgage.

Witness excused.

(Signed) THOS. CARSTENS.

[Deposition of Alex Wilson—Redirect Examination, etc.]

Redirect Examination of Mr. ALEX WILSON Conducted by Mr. THOMAS R LYONS, Attorney for Defendants.

(Read by Mr. LYONS.)

Q. Since you testified before in this case, have you had occasion to reflect on your testimony which

(Deposition of Alex Wilson.)

might enable you to explain any part of your testimony that you gave before? A. Yes, sir.

Q. Will you state what correction you desire to make?

Plaintiff objects to any testimony of this witness in any manner connected with the store at Chititu, Alaska, for the reason that it is irrelevant, incompetent and immaterial in this that the testimony offered shows that the store at Chititu was at all times the property of the Nizina Trading Company, and that the Carstens Packing Company had no interest whatever in that store or property.

Objection overruled. Plaintiff allowed an exception. [303—285]

A. After I left here I went up to the store and spoke to my wife about 1907, your saying that the business did not pay; she said (my wife was the book-keeper of the store): "We invested most of the cash in furs, the proceeds of 1906 and the spring of 1907," and of course we did not take in enough during the summer to pay my salary, that is, up to \$90.00; took it all in except \$90.00.

Q. What was the bill of furs that you purchased during the winter and spring of 1906-7?

Plaintiff objects to this question on the ground that it is not the best evidence. The witness has stated there are books, the books themselves will show.

Objection overruled. Plaintiff allowed an exception.

A. Not less than \$500, and maybe up to \$800.00,

(Deposition of Alex Wilson.)

between \$500.00 and \$800.00 worth of furs.

Q. Did you pay cash for these furs?

A. Cash—that always had to be paid in cash.

Recross-examination Conducted by Mr. T. J. DON-

OHOE, Attorney for the Plaintiff.

(Read by Mr. DIMOND.)

Q. You paid between \$500 and \$800 during the winter of 1906, for furs? A. Yes.

Q. Where did you get that cash?

A. We took it in during the summer and part of the fall, after I remitted to Mr. Meyers.

Q. You remitted to him when he was in Alaska—that was the fall?

A. That was the latter part of September; he left the 6th day of October.

Q. You took in between \$500 and \$800 in that store between October, 1906, and the early spring of 1907?
[304—286]

A. No, that is from the time I left there to come out.

Q. When did you leave?

A. Between the 26th of August and the 1st of September, to come out. My wife was running the store, and took the money in while I was gone.

Q. How much money did your wife have when you left? A. I don't remember.

Q. Of these furs, what part of them did you take out with you?

A. I took out just what I thought would be a plenty to pay the \$90, just a few of them, because I was afraid to take the furs down the river. Because

(Deposition of Alex Wilson.)

I was in the first boat that ever went down Copper River and landed at Valdez, I was afraid to risk them. I came down Copper River to the mouth.

Q. You don't claim that was the first boat that ever went down the Copper River, do you?

A. Yes, the first boat that ever went down to the mouth and landed at Valdez.

Q. These furs that you claim you bought for from \$500 to \$800 were the furs that you turned over to Fagerberg, that you claimed were worth \$4,000, were they not?

A. No; we have a list of all the furs we bought that year, and they are shown on the books. The furs had been accumulating for a long time, you understand, as we had no way to take them out.

Witness excused.

(Signed) ALEX G. WILSON.

[305—287]

[Deposition of Henry Wolf, for Defendants.]

Direct Examination of HENRY WOLF Conducted
by Mr. THOMAS R. LYONS, Attorney for the
Defendants.

(Read by Mr. LYONS.)

Q. State your name and place of residence?

A. Henry Wolf, 3822 North 18th, Tacoma, Washington.

Q. Did you ever take any cattle from Seattle to Alaska?

A. Yes, I took a car load of cattle from Seattle to McCarthy, from Carstens Packing Company, and delivered them to the Fagerbergs.

(Deposition of Henry Wolf.)

Q. When was this?

A. During the summer of 1912.

Q. Did you have any conversation with H. M. Fagerberg at the time the cattle were delivered?

A. After they were unloaded I walked with him to the roadhouse, in a general conversation he said, "That is a nice bunch of cattle, and we ought to make some money out of them."

Q. Was any one else present?

A. No, we were walking back alone, along the railroad track.

Q. Did you ever have control of the Chititu store for the Carstens Packing Company?

A. Yes, I was sent up there to take stock.

Q. When was that?

A. During the summer of 1912, after I got through delivering cattle.

Q. Did you take the stock of the store at that time?

A. I did.

Q. What did the inventory amount to at that time?

A. About \$500 if my memory is right.

Objected to by plaintiff as not the best evidence, as the inventory itself will show the amount.

Objection overruled. Plaintiff allowed an exception.

Q. Have you a copy of that inventory?

A. I have not.

Q. Do you know whether or not there is a copy of it in Valdez at this time? [306—288]

A. I do not.

Q. But you remember taking the inventory and signing for it?

(Deposition of Henry Wolf.)

A. I did so. My best recollection is that it inventoried about \$500, principally in hardware.

Plaintiff moves to strike as not the best evidence.

Motion denied. Plaintiff allowed an exception.

Cross-examination of Mr. WOLF Conducted by Mr.

T. J. DONOHOE, Attorney for the Plaintiff.

(Read by Mr. DIMOND.)

Q. You went to Alaska in 1912 with cattle?

A. Yes.

Q. Your first trip? A. Yes.

Q. Have you been there since?

A. No, I have been down here since. (Yes, I made one more trip about two months later—B. A. N.)

Q. How were these cattle billed?

A. To Carstens Packing Company.

Q. And you were there as their agent?

A. Yes.

Q. Who did you actually deliver them to?

A. The two brothers, A. J. and H. M. Fagerberg.

Q. Did H. M. sign any receipt for them?

A. Neither of them did.

Q. How do you know you delivered them to Harry Fagerberg? A. He went there with me.

Q. To help unload? A. Yes.

Q. And he helped you unload? A. Yes.

Q. That is all you know about it, actually?

[307—289]

A. Why, that and what he said about its being a nice bunch of cattle and they ought to make some money out of them.

Q. He said we ought to make some money out of

(Deposition of Henry Wolf.)

them? A. Yes, he did.

Q. That is impressed on your mind so that you remembered it over two years?

A. That impressed me that they were partners.

Q. Well why did the word "we" impress you that they were partners?

A. Anyone would think so.

Q. Was anyone questioning the partnership at that time? A. Not that I know of.

Q. Who told you that the Fagerberg Brothers were in partnership?

A. One party was the butcher.

Q. Glassbrenner & Smith? A. Yes.

Q. Which one? A. Both.

Q. Who were present at such conversation?

A. Smith and his partner and myself were present.

Q. How did the conversation come up?

A. In a general conversation.

Q. In what month of 1912 was that?

A. In the summer of 1912.

Q. In the summer of 1912 Smith and Glassbrenner stated to you in the town of Cordova that A. J. Fagerberg and H. M. Fagerberg were in partnership? A. Yes, sir.

Q. Was any one else present at that conversation? A. Not that I remember.

Q. And from that conversation with Smith and Glassbrenner you remembered Harry Fagerberg as saying, "That some money ought to be [308—290] made by them"—or "We ought to make some

(Deposition of Henry Wolf.)

money"—out of them?

A. Yes. That day Al took the horse back from the place where we were unloading cattle, and Harry and I walked back by the railroad track, and in a general conversation this matter came up, and he said, "That is a fine bunch of cattle and we ought to make some money out of them."

Q. He did not say "some money ought to be made out of them"?

A. No, he said we ought to make some money.

Q. How long did you stay in McCarthy?

A. About two weeks.

Q. Did you stay at the roadhouse? A. Partly.

Q. Then you went to Chititu? A. Yes.

Q. Was Harry running the roadhouse?

A. No, the roadhouse was in charge of a lady, I think, a Mrs. Cole.

Q. Who helped you take the inventory?

A. I took it myself.

Q. What authority had you to take this inventory? A. They wrote me to go up.

Q. Gave you a note to Fagerberg Brothers?

A. I don't remember.

Q. You have stated all you heard that impressed you that they were partners?

A. I heard several parties inquiring if there was any fresh meat in town, and they said in a few days at Fagerberg Brothers' store.

Q. Did they have a sign out? A. No.

Q. You are working for Carstens Packing Company now, are you not?

(Deposition of Henry Wolf.)

A. No, I have not been since. (The last trip in—

B. A. N.)

Q. What is your business? [309—291]

A. Meat cutter.

Q. When you returned from Alaska in 1912 you severed connection with the Carstens Packing Company? A. Yes.

Q. And have not worked for them since?

A. No.

Witness excused.

(Signed) HENRY WOLF.

Defendants offer in evidence a letter, dated Seattle, Washington, June 5, 1907, from Herman Meyer to Mr. Alex G. Wilson, and plaintiff admits that the letter is a letter from Herman Meyer to Alex G. Wilson, and that the signature attached thereto is the signature of Herman Meyer, but plaintiff objects to the letter being offered in evidence for the reason that the same is irrelevant incompetent and immaterial, and for the further reason that it is shown by the testimony that the Carstens Packing Company were not at any time in any manner interested in the store at Chititu, or had any interest in the goods contained therein.

As far as the plaintiff in this action is concerned, it is admitted that exhibit "A" offered in the deposition of W. C. Prater is a transcript of the books of the Carstens Packing Company and makes no objection on account of its not being the original entry of the account therein set forth.

By the COURT.—The objection to the letter will

be overruled and plaintiff allowed an exception.

The letter is marked "B," admitted in evidence and read to the jury by Mr. Dimond, as follows:

[Exhibit "B" Attached to Deposition of Alex G. Wilson.]

Seattle, Wash., June 5, 1907. [310—292]

Mr. Alex G. Wilson,
Chititu, Alaska.

Dear Sir:

We have sold our interest in the stock, etc., on Chititu and at Tonsina to Mr. A. J. Fagerberg. Mr. Carstens thought it best to dispose of our interest there and I acquiesced.

Please remain with Mr. Fagerberg until he gets familiar with the business or longer if he desires and when you take the inventory—as I expect you will do at once upon his arrival—have same made up same as when you took over the stock, and have it receipted for by him.

I would like very much to see the liquors disposed of this season but this is up to Mr. Fagerberg now.

If you want to go prospecting during the bal. of the season for our joint account would like to have you do so.

Please make up statement and send same to us along with what money you have on hand at your earliest chance, and let me know just where you intend to go if you do not remain in there and where I may meet you.

Yours in haste,

(Signed.) HERMAN MEYER.

Will write you fully in next mail.

State of Washington,
County of King,—ss.

**[Certificate of Notary Public to Depositions of
Thomas Carstens et al.].**

I, B. A. Northrup, a notary public in and for said county, do hereby certify that the witnesses in the foregoing depositions, named Thomas Carstens, W. C. Prater, Herman Meyer, Alex Wilson and Henry Wolf, were by me duly sworn; that the said depositions were then taken at the time and place mentioned in the annexed Stipulation, to wit, at the office of Lyons & Orton, in the Alaska Building, in the County of King, State of Washington, and on the 21st day of January, 1915, between the hours of 2:00 P. M. and 5:00 P. M. of that day; that said depositions were reduced to writing by Mrs. B. B. Dearborn, a qualified stenographer, and when completed were carefully read by said witnesses and being by them corrected, were by them subscribed in my presence.

Witness my hand and official seal this 5th day of March, 1915.

[Seal] (Signed) B. A. NORTHRUP,
Notary Public.

Mr. LYONS.—I will now read the depositions of Alex Wilson and C. I. Range, taken in accordance with the following stipulation: **[311—293]**

*In the District Court for the Territory of Alaska,
Division Number Three.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal for
the Third Division of the Territory of Alaska,
and JAMES M. MILLSAP, Deputy United
States Marshal for the Third Division of the
Territory of Alaska,

Defendants.

**Stipulation to Take Depositions [of Alex Wilson
and C. I. Range].**

IT IS HEREBY STIPULATED AND AGREED
by and between all of the parties to the above-en-
titled action, by their respective attorneys, that the
depositions of Alex Wilson and C. I. Range may
be taken at the offices of Lyons & Orton, in the
Alaska Building, at the City of Seattle, State of
Washington, on the 23d day of January, 1915, before
B. A. Northrup, a Notary Public in and for the State
of Washington, commencing at the hour of 4:00
o'clock P. M. and continuing until both of said depo-
sitions are taken; that such depositions may be taken
upon oral interrogatories propounded by the coun-
sel at the time; that when such depositions are taken
they shall be forwarded to the clerk of the above-
entitled court at Valdez, Alaska, and that said depo-
sitions may be read in evidence by either of the

parties hereto on the trial of the above-entitled action, subject only to objections on account of incompetency, irrelevancy and immateriality.

Dated at Seattle, Washington, this 23d day of January, 1915.

DONOHOE & DIMOND,

Attorneys for Plaintiff.

LYONS & RITCHIE and

LYONS & ORTON,

Attorneys for Defendants. [312—294]

*In the District Court for the Territory of Alaska,
Division Number Three.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal for
the Third Division of the Territory of Alaska,
and JAMES M. MILLSAP, Deputy United
States Marshal for the Third Division of the
Territory of Alaska,

Defendants.

Depositions [of Alex Wilson and C. I. Range.]

BE IT REMEMBERED that, pursuant to the stipulation hereunto annexed, and on the 23d day of January, 1915, at Seattle, in the County of King, and State of Washington, before me, B. A. Northrup, a Notary Public in and for said County of King, personally appeared Alex Wilson and C. I. Range, witnesses, produced on behalf of said defendants,

(Deposition of Alex Wilson.)

in the above-entitled action, now pending in the said court, who, being by me first duly sworn, were then and there examined and interrogated by Mr. Thomas R. Lyons, of counsel for the said defendants, and Mr. T. J. Donohoe, of counsel for said plaintiff, and testified as follows:

[Deposition of C. I. Range, for Defendants.]

Direct Examination of C. I. RANGE, Conducted by
Mr. THOMAS R. LYONS, Attorney for the
Defendants.

(Read by Mr. LYONS.)

Q. State your name and place of residence.

A. C. I. Range, 5721 Woodland Avenue, Seattle.

Q. Did you ever live in Alaska?

A. Yes, I have been in Alaska for almost 18 years.

Q. Were you ever at Blackburn and Chititu, in the Third Division of Alaska?

A. Off and on since 1903.

Q. Were you acquainted with J. A. Fagerberg?

A. Yes, sir.

Q. Are you acquainted with H. M. Fagerberg, the plaintiff in this action? **[313—295]** A. Yes.

Q. Are the two Fagerberg boys brothers?

A. Claim to be.

Q. How long have you known the Fagerberg brothers?

A. I have known Al for about 12 years.

Q. Al is J. A., is he not? A. Yes.

Q. He is known as Al? A. Yes.

Q. How long have you known H. M. Fagerberg?

A. I have not known him so long, only for about

(Deposition of C. I. Range.)

six or eight years.

Q. H. M. is known as Harry Fagerberg?

A. Yes.

Q. Did you ever have any business dealings with either of the Fagerberg Brothers, or both of them?

A. Yes.

Q. When? A. In 1911 and 1912.

Q. Where?

A. At McCarthy, or Blackburn as it is now called, I believe.

Q. What business were you engaged in?

A. Foreman for the Dan Creek Mining Company.

Q. Foreman for the Dan Creek Mining Company?

A. Yes.

Q. During all of 1911 and 1912?

A. During 1911, 1912 and 1913.

Q. What business was J. A. Fagerburg engaged in at that time?

A. In the packing business and had a store at Chititu, and also had a store and hotel there at Blackburn.

Q. Was the hotel sometimes called a roadhouse?

A. Yes. [314—296]

Q. What business was H. M. Fagerberg engaged in at that time?

A. He was in the same business.

Q. In the same business as his brother? A. Yes.

Q. State whether or not they worked in the store and in the hotel together, or around the hotel and store together. A. Yes.

Q. They did? A. Yes.

(Deposition of C. I. Range.)

Q. During all of the time you mention?

A. Yes.

Q. Did you ever see any billheads of J. A. Fagerberg or H. M. Fagerberg, or Fagerberg Brothers?

Plaintiff objects to the last part of the question as to the billheads of Fagerberg Brothers, on the ground that it is not the best evidence, the billheads themselves being the best evidence.

Objection overruled. Plaintiff allowed an exception.

A. Why, I did have several billheads until last summer, when I destroyed all my old receipts to make room for new ones.

Q. You say you had several billheads, but that you have destroyed them?

A. Yes, of Fagerberg Brothers.

Q. The billheads were billheads of Fagerberg Brothers?

Plaintiff makes same objections—not the best evidence.

Objection overruled. Plaintiff allowed an exception.

A. Yes, they were.

Q. State whether or not these billheads were ever used by Fagerberg Brothers in their relations with you? A. Yes, several of them.

Q. In what way?

A. Stuff that I bought there. [315—297]

Q. You bought goods from them? A. Yes.

Q. During what part of the time?

A. During 1911 and 1912.

(Deposition of C. I. Range.)

Q. Did you buy on credit?

A. I had it charged until I got through with my haul, and then I settled the whole thing, the Dan Creek Mining Company bill and my own bill.

Q. You say you bought provisions, goods, wares and merchandise from Fagerberg Brothers?

A. Yes.

Q. And they afterwards presented bills to you?

A. No, I don't know that they presented bills, but I went and paid them in the store.

Q. But in their account with you, on what billheads did they have your account stated?

A. Fagerberg Brothers.

Q. Fagerberg Brothers? A. Yes, sir.

Plaintiff moves to strike the last answer as not the best evidence, as the billheads speak for themselves.

Objection overruled. Plaintiff allowed an exception. (Motion denied.)

Q. Did you ever have any conversation during the year 1911 or 1912 with H. M. Fagerberg, the plaintiff in this action, with reference to any business relationship that existed between himself and J. A. Fagerberg? A. Yes, sir.

Q. When and where was such conversation had?

A. It was in our mess tent on Dan Creek. [316 — 298]

Q. When did that conversation take place?

A. In 1912, in April, I think.

Q. You think it was in April, 1912? A. Yes.

Q. Who were present when this conversation took place?

(Deposition of C. I. Range.)

A. That I cannot tell you; a man working for him that I could not tell you his name.

Q. Can you state the substance of that conversation? A. I can.

Q. Please do so.

A. It came up with regard to their business over there, they had some trouble about their business; he was talking to me about it, Harry Fagerberg was, and I asked him how he was situated over there, and he said he owned a half interest in the whole thing, and that they were trying to beat him out of it, and I said to him that I would take a club and drive them out if I was in his place.

Q. Drive who out?

A. Al and a lady who was there.

Q. Some woman—do you know her name?

A. Mrs. Damon.

Q. Now, when Harry Fagerberg stated they were trying to beat him out of his interest, to whom did he refer? A. Al and the woman.

Q. And I understand you to state that he said he owned a one-half interest in everything?

A. Yes, everything they had, the Chititu store and the roadhouse, and store over there at Blackburn, and the mine on Dan Creek. [317—299]

Cross-examination of C. I. RANGE, Conducted by
T. J. DONOHOE, Attorney for the Plaintiff.

(Read by Mr. DIMOND.)

Q. Mr. Range, these goods you say you bought; who did you buy them from? A. Al Fagerberg.

Q. Who did you buy them for?

(Deposition of C. I. Range.)

A. Some for myself, and some for the boys working on Dan Creek.

Q. Now, were these bills rendered to you?

A. To me.

Q. To you?

A. Yes. I had full charge of the Dan Creek Mining Company at that time.

Q. When did you have full charge?

A. Until Mr. Birch came in the spring.

Q. In what years? A. 1911, 1912 and 1913.

Q. And each year you would have full charge of the mine for how long? A. Three months.

Q. Commencing when?

A. January 1st we would leave here, and take in about \$200.00 worth of supplies each year.

Q. Have you ever been in the Shushana country?

A. Yes.

Q. Have you any connection with the Carstens Packing Company? A. No.

Q. Or with Mr. Carstens?

A. No, I do not know the gentleman.

Q. How long have you known the Carstens Packing Company? A. I don't know them.

Q. How long have you known Mr. Prater?

A. Met him yesterday. [318—300]

Q. How long have you known Thomas Carstens?

A. I don't know him at all.

Q. When did this conversation between you and H. M. Fagerberg take place?

A. Some time in April, 1912.

Q. In April, 1912—this is now almost three years

(Deposition of C. I. Range.)

ago, is it not? A. Yes.

Q. Now, to whom did you first speak of this conversation?

A. The people up there talked it, I do not know just who, we talked it among ourselves.

Q. You remember the substance of this conversation very clearly, do you? A. Yes, sir.

Q. Now, just state some other conversation you had with him about the same time.

A. The same time?

Q. Yes, three years ago.

A. Different things, about having to have caches up there.

Q. Now, is your memory so good that you would remember a casual conversation three years?

A. My memory is pretty good; I can remember some things that happened when I was three years old.

Q. You told Mr. Wilson of this conversation, did you not, yesterday? A. No.

Q. When did you tell Mr. Prater about it?

A. About four o'clock yesterday.

Q. You have business relations with Mr. Prater?

A. No, sir, I met him yesterday for the first time in my life.

Q. Will you kindly state what was the occasion of calling this conversation to your memory after a lapse of three years?

A. What was the cause of it? [319—301]

Q. Yes.

A. They asked me if I knew certain things about Fagerberg.

(Deposition of C. I. Range.)

Q. Who asked you? A. Mr. Prater.

Q. And you never met him until yesterday?

A. No, sir.

Q. How came he to ask you about it?

A. Mr. Wilson called me up over the telephone in the forenoon, and asked me if I had any billheads of the Fagerberg Brothers, and I told him I did not know, that I would look, but that I had destroyed a good many of my old receipts, and thought I had destroyed them.

Q. How long have you known Mr. Wilson?

A. For about 11 years—I think it was in 1903.

Q. And that is what recalled this conversation to your memory, was it? A. Yes.

Q. Later in the day you met Mr. Wilson and talked over the situation?

A. No, not about that situation, not about Harry and my conversation; that was after this gentleman came in.

Q. You came down at his request to see Mr. Prater, did you?

A. Yes, he said he had some things he wanted to talk over with me, and I told him I would be down in the afternoon.

Q. Are you still with the Dan Creek Mining Company? A. No, I am not.

Q. Now, what was the amount of charge against the Dan Creek Mining Company on the billhead that was rendered to you in 1912?

A. The exact account I cannot state, but I think it was about \$140.

(Deposition of C. I. Range.)

Q. Do you say it was \$140?

A. Something like that—one bill I paid was \$170.

Q. State the amount of your bills in 1913?

A. I cannot say as to that. [320—302]

Q. You cannot remember?

A. I could not say—I paid my bills.

Q. What was the particular thing that impressed the fact that it was Fagerberg Brothers on these bills, in your mind?

A. It was printed in big letters.

Q. What other billheads did you get that year? What was printed on the other billheads?

A. I never got any after that spring. I never had any dealings with them after 1912.

Q. Did you not have any dealings with them in 1913? A. No.

Q. In 1911? A. Yes.

Q. What dealings in 1911?

A. During the month of February, while I was hauling freight.

Q. From where? A. From Blackburn.

Q. To Dan Creek? A. Yes.

Q. With whom did you have the dealings at that time? A. With Al Fagerberg.

Q. To whom did you pay the money?

A. To Al; I never paid to Harry in my life.

Q. You made your contract twith J. A. Fagerberg and paid J. A. Fagerberg the money?

A. Yes, sir.

Q. You never paid Harry any money? A. No.

Q. Never made any contracts with him?

(Deposition of C. I. Range.)

A. No. Harry was most of the time tending horses, and packing, and such like, and was over to Chititu—over there some of the time [321—303]

Q. What is your occupation now?

A. Placer mining.

Q. Are you working in Alaska yet? A. Yes.

Q. In Shushana? A. Yes.

Q. You severed your connection with the Dan Creek Mining Company in 1913? A. Yes.

Q. At the end of the season. A. Yes.

Q. Now, what were the names—just describe what was on that billhead that you speak of?

A. I can only describe it in this way, that at the top was printed Fagerberg Brothers, across the top, Groceries and General Merchandise.

Q. The last bill you got of this kind was in 1912?

A. Yes.

Q. During all of the time from 1912 until yesterday, you had no occasion to think about that billhead? A. Why, yes, sir.

Q. When did you think about it?

A. Last fall when I burned them up.

Q. Why did you?

A. Because I was going over my old billheads, because I was making room, and all of the old bills were paid, and so they were of no more use to me, and I put them in the fire.

Q. Did you not turn the bills over to the Dan Creek Mining Company?

A. Yes, their bills, but these were my own particular bills.

(Deposition of Alex Wilson.)

Q. When did you get your particular bills?

A. At the same time. [322—304]

Q. For what?

A. There were shoes, boots, sacks, mittens for myself and the boys who were working for me—I had them charged to me.

Q. Why?

A. Because the boys had no money to pay for their things, so I paid for them, and they paid me.

Q. The Dan Creek Mining Company did not hold it out? A. No, the boys paid me.

Q. Now, what was the amount of this bill of yours that you got—these goods that you speak of?

A. There were several bills, one of them was for \$20.00 or \$25.00, or some \$5.00 or \$6.00, one I remember was \$10.00 for a gallon of syrup.

Q. You stated in your examination that H. M. Fagerberg was in the business at Blackburn in 1911—am I right in that? A. Yes.

Q. How do you know that he was there in any capacity other than as an employee of J. A. Fagerberg?

A. All I know is from what Harry told me, and from the billheads.

Q. You know nothing else as to the claim that he was in partnership with J. A.?

A. Nothing but what he told me—and the billheads as Fagerberg Brothers.

Q. You had just that one conversation with him in the mess tent of the Dan Creek Mining Company?

A. Yes.

(Deposition of C. I. Range.)

Q. Did you know Harry Fagerberg intimately?

A. Pretty intimately; he had slept with me in my office, and had eaten at my table. I had fed them both a lot.

Q. Were you a particular friend of Harry's at that time? A. A pretty good friend. [323—305]

Q. When did this conversation take place?

A. About 1912.

Q. You did not meet him in 1913, did you?

A. I saw him several times, yes.

Q. Have any conversation with him? A. No.

Q. And you cannot remember any other conversation in detail that you had with him in 1911 or 1912?

A. Why I—not in particular, only in talking with him about business, or something like that, how he was making it in the packing and store business.

Q. But you remember that one conversation in detail?

A. Yes, because of the points which fetched up this conversation, and I rather think Harry will remember it just as well as I do.

Q. How do you know this conversation took place in April of 1912?

A. It was after or just about the time that I was half through freighting that I went up there to the camp, and he was stopping at my place up there, and I gave him the key to the cook tent during the time he was putting in caches there.

Q. During all of this time nothing else has occurred to call your attention to this conversation until Mr. Wilson called you yesterday?

(Deposition of C. I. Range.)

A. Why, yes, talking with the other boys up there about how the brothers had treated one another; different conversations about the trouble between the Fagerbergs.

Q. Now, what was this talk you had about how they had treated one another?

A. This trouble between Al and Harry, and as I told you, I told him I would go over there and take a club and drive Al out.

Q. The trouble was about money matters between Al and Harry? [324—306]

A. Yes.

Q. You had no occasion to recall this conversation since 1912?

A. I have talked with fellows coming out this fall.

Q. Name the people you talked with, please.

A. Different ones of the old Alaskans.

Q. You cannot remember who you discussed it with by name?

A. Well, I think I discussed it with Mr. Foster, this last trip coming down—H. D. Foster, he is a miner.

Q. Is he an old-timer? A. Yes.

Q. How long has he been in there?

A. About ten years; ten years ago this last summer I met him.

Q. How came you to discuss it with him?

A. He was acquainted with the same matter, and we got to discussing the lady and where she was, and I asked if they were still in partnership, and he said he did not know, but that they seemed to be work-

(Deposition of C. I. Range.)

ing together this year.

Q. When? A. This fall coming out, in 1914.

Q. What boat? A. Mariposa.

Q. Where did you take the Mariposa?

A. Cordova.

Redirect Examination of Mr. RANGE, Conducted
by Mr. THOMAS R. LYONS, Attorney for De-
fendants.

(Read by Mr. DIMOND.)

Q. Counsel asked you if there was any circumstances which would recall this conversation or impress it on your mind, and among other things you stated that you had told Harry what you would have done to his brother if he had treated you as he treated [325—307] him. Now, after that conversation, was there anything—any difficulty, between the brothers about money matters?

A. Yes, a first fight and knockout, with, I thing an iron poker.

Q. Did not that tend to impress the conversation on your mind?

A. Yes, and to different ones I have said since that it was too bad Harry did not kill him, and that it was a wonder he did not kill Harry.

Q. Who?

A. Al, it was a pity Harry did not kill Al.

Recross-examination of Mr. RANGE, Conducted by
Mr. T. J. DONOHUE, Attorney for the Plain-
tiff.

(Read by Mr. DIMOND.)

Q. Then in your opinion, Mr. Range, Al Fagerberg

(Deposition of C. I. Range.)

has treated Harry rather poorly, has he not?

A. That was my opinion at the time.

Q. That is your opinion still is it not, that he did not give Harry a square deal?

A. I am satisfied that he did not give him a square deal.

Q. Were you present when that fight occurred?

A. I was not in the house, I was out at one of the other places, I did not see the row.

Q. When did that fight occur? A. In 1912.

Q. What month, and what day of the month?

A. It must have been in April, just after I had the talk with Harry, about two days after.

Q. In April of 1912, and occurred in Blackburn?

A. Yes.

Witness excused.

(Signed.) C. I. RANGE. [326—308]

**[Deposition of Alex Wilson for Defendants
Recalled—Redirect Examination).]**

(Redirect Examination of Mr. ALEX WILSON,
Conducted by Mr. THOMAS R. LYONS, Attorney
for the Defendants.

(Read by Mr. LYONS.)

Q. Have you any bill in your possession of Fagerberg Brothers A. Yes, sir.

Q. Would you exhibit it? A. Yes, sir.

Q. Where did you get this bill?

A. I got that bill about two hours ago from Mr. Steele—Mr. William Steele.

Q. Who is William Steele?

(Deposition of Alex Wilson.)

A. He is an employe of the Westover Copper Company on Dan Creek.

Q. I call your attention to the bill which you have exhibited, and ask you whose writing that is, Fagerberg Bro. by H. M. Fagerberg?

A. H. M. Fagerberg, his signature.

Defendants now offer in evidence the bill concerning which the witness has just testified, and identify the same as follows: A bill of the Alaska United Copper Ex. Co. to Fagerberg Bros. Dr., dated April 1, 1913, receipted as follows: Paid April 11, (or apparently 11), 1913, Fagerberg Bro. by H. M. Fagerberg, the total amount of the bill being \$91.30, and ask that the same be marked Defendants' Exhibit "C."

To which offer plaintiff objects on the ground that there is no evidence to show that the bill offered in evidence was a bill in any manner connected with the Fagerberg Bros., or H. M. Fagerberg, in the transactions had in Alaska or with this action; and second, for the reason that the witness Wilson has in no manner qualified so as to show his ability to recognize the handwriting of or the signature of H. M. Fagerberg.

Objection overruled. Plaintiff allowed an exception.

The bill is marked Defendants Exhibit "C" and admitted in evidence—It reads as follows: [327—309]

**Defendants' Exhibit "C"—Attached to Deposition
of Alex. Wilson.**

April 11, 1913.

Alaska United Copper Ex. Co.

To Fagerberg Bros. Dr.

J. Petrie	\$10.75
J. Finnigan	29.25
H. D. Foster.....	29.80
J. Conway	21.50

Total.....\$91.30

Paid April 11, 1913.

FAGERBERG BRO.

Per H. M. FAGERBERG.

Q. Are you familiar with the handwriting of H. M. Fagerberg?

A. All I know is, it corresponds with the signatures I have of Harry Fagerberg's; the writing is identically the same.

Q. Have you seen several signatures which you knew to be the signatures of H. M. Fagerberg?

A. Yes.

Q. Then you are familiar with his signature and his handwriting?

A. Not with his handwriting, but with his signature.

Q. From what you know of his handwriting and his signature, you testify that this is the signature of H. M. Fagerberg? A. Yes.

Recross-examination of Mr. WILSON, by T. J. DONOHOE, Attorney for the Plaintiff.

Q. When did you receive the last receipt signed

(Deposition of Alex Wilson.)

by H. M. Fagerberg, Mr. Wilson? A. In 1907.

Q. 1907? A. Yes.

Q. Now over seven years, is it not? A. Yes.

Q. How many receipts have you ever received from H. M. Fagerberg? [328—310]

A. I don't know—let me see, I have got them copies, all them copies, I know, and the bill of sale of the Sourdough Cabins, and what was the other transaction?—There must have been another one, but I can't place it.

Q. Now, you have no receipts signed H. M. Fagerberg? A. Yes, I have.

Q. What one?

A. I have the Sourdough Cabins receipt, and the invoice of stock being turned over.

Q. That is two?

A. Yes—and the third one I cannot place.

Q. Now, you received two receipts from H. M. Fagerberg in 1907? A. Yes.

Q. Had you ever known him before that?

A. No.

Q. And how long did you know him afterwards?

A. About a month.

Q. With him a month? A. No, two weeks.

Q. Whatever time it took you to check up?

A. Yes.

Q. Now, I understand you to say you never met him until 1907, am I right in this? A. Yes, sir.

Q. Then you were with him less than two weeks?

A. About two weeks.

Q. And during that time he signed a receipt for

(Deposition of Alex Wilson.)

stock turned over at the Chititu store? A. Yes.

Q. Where is that receipt?

A. It is out there, and I have a copy of it down to the store. [329—311]

Q. And you sold him the Sourdough Cabins?

A. Yes, sir.

Q. What receipt did you get for the Sourdough Cabins? A. I have that too.

Q. What did he give you in connection with the Sourdough Cabins? A. A receipt.

Q. Why? A. I turned them over to him.

Q. You sold him the Sourdough Cabins and gave him a bill of sale for them?

A. I turned them over to him.

Q. You turned them over to him and he gave you a receipt for them?

A. They belonged to the Nizina Trading Company, and I turned them over to him.

Q. Then you got two receipts from him, one for the Sourdough Cabins and one for the stock of goods turned over to him in April, 1907? A. Yes, sir.

Q. And you have never seen this signature since that time? A. Yes, I have.

Q. During the past few days? A. Yes.

Q. What was the receipt—what receipt did you look over during the past few days?

A. Principally the invoice receipt.

Q. So you think you can identify the signature on this exhibit? A. Yes.

Q. Did you compare it with the signature on the invoice receipt?

(Deposition of Alex Wilson.)

A. No, I did not take it down to the store to compare it, but I would know that signature in a thousand years.

Q. You have looked your receipts over pretty carefully during the past few days? [330—312]

A. Yes, sir.

Q. Have you any interest in this suit?

A. No.

Q. What is your business?

A. Furniture business.

Q. What connection have you with Carstens Packing Company? A. None whatever.

Q. You have considerable enmity against both of the Fagerberg boys? A. None whatever.

Q. Then why are you showing such unusual activity in this particular suit?

A. Well, there are other reasons.

Q. Nothing to do with the Fagerbergs? A. No.

Q. Is that the best answer you care to make?

A. That is about all,

Q. You hunted up Will Steele did you?

A. Yes.

Q. When? A. This afternoon.

Q. Where did you find him, in the Washington Annex?

A. No, I found him in the Colman Block.

Q. And you induced him to give you that receipt?

A. The same as all the other boys would do favors for me,

Q. What do you mean,—other boys?

A. I mean that I am acquainted with.

Q. You think you are pretty popular?

(Deposition of Alex Wilson.)

A. With a certain class.

Q. And with another certain class you are not?

A. That is right, I guess.

Q. You called Mr. Range too, and brought him here as a witness? [331—313] A. Yes.

Q. And you are doing this for a compensation from Carstens Packing Company?

A. No, not a cent.

Q. Not a cent? A. No, nor never expect any.

Re-redirect Examination of Mr. WILSON, Conducted by Mr. THOMAS R. LYONS, Attorney for Defendants.

(Read by Mr. DIMOND.)

Q. You stated to Mr. Donohoe that there were other reasons—will you state why you are manifesting such an interest in this litigation—will you state what these reasons are?

A. There is a certain gang on that Creek that I do not like.

Q. Is that all? A. Yes.

Q. Well, would your dislike for any man up there make you take such an interest in this case as to color your testimony, either consciously or unconsciously?

A. No.

Re-recross-examination of Mr. WILSON, Conducted by Mr. T. J. DONOHOE, Attorney for the Plaintiff.

(Read by Mr. DIMOND.)

Q. Then the interest in this case that you are taking is all on account of your enmity for certain fellows on Chititu Creek?

(Deposition of Alex Wilson.)

A. Yes, I think that is about it.

Q. Neither Esterly or Kernan have anything to do with this suit, have they? A. No.

Q. But you are active in this suit on account of your enmity for certain fellows on Chititu Creek?

A. Not particularly that; I like to see a straight man treated right.

Q. Do you know anything about Harry Fagerberg that is not straight?

A. No, I don't. All I am in this for is to tell the transactions [332—314] that I was through, that is all I am here for.

Q. You told that the other day? A. Yes.

Q. At the same time, you have procured Mr. Range as a witness, and got this bill from Will Steele, all because you want to see Mr. Carstens treated right in this affair? A. Yes.

Q. You and Mr. Carstens are particular freinds, are you? We are not.

Q. And you have left your furniture business out of pure kindness of heart to Mr. Carstens?

A. I have left my business an hour at a time; I could have got many witnesses and a lot more bills, but I had no time.

Q. You spent an hour yesterday?

A. Yes, I spent an hour yesterday.

Q. You spent an hour procuring Mr. Range as a witness? A. Yes.

Q. Because of your desire to see an honest man get a square deal you are willing to devote an hour a day to this suit?

A. I would devote many an hour for that.

Witness excused.

(Signed.) ALEX. G. WILSON.

**[Certificate of Notary Public to Depositions of Alex
Wilson et al.]**

State of Washington,

County of King,—ss.

I, B. A. Northrup, a notary public in and for said county, do hereby certify that the witnesses in the foregoing depositions, named Alex Wilson and C. I. Range, were by me duly sworn; that said depositions were then taken at the time and place mentioned in the annexed stipulation, to wit at the offices of Lyons & Orton, in the Alaska Building, in the County of King, State of Washington, and [333—315] on the 23d day of January, 1915, between the hours of 4:00 P. M. and 5:30 P. M. of that day; that said depositions were reduced to writing by Mrs. B. B. Dearborn, a qualified stenographer, and, when completed, were carefully read by said witnesses, and being by them corrected, were by them subscribed in my presence.

Witness my hand and official seal this 5th day of March, 1915.

[Notarial Seal]

B. A. NORTHRUP,

Notary Public.

Mr. DIMOND.—I think that completes the depositions.

By the COURT.—Have you any further testimony, Mr. Lyons?

Mr. LYONS.—I want to read to the jury exhibit “C” attached to the deposition of Mr. Wilson being

a bill to the Alaska United Copper Ex. Co. to Fagerberg Bros.

By the COURT.—Very well.

(Mr. Lyons reads the exhibit to the jury; it already appears in this record.)

Defendants rest.

Mr. DIMOND.—We will call Mr H. M. Fagerberg in rebuttal. [334—316]

Rebuttal.

**[Testimony of H. M. Fagerberg, the Plaintiff,
Recalled in His Own Behalf, in Rebuttal.]**

H. M. FAGEBERG, the plaintiff, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination.

(By Mr. DIMOND.)

Q. You heard the testimony of Mr. Wilson read here? A. Yes, sir.

Q. Mr. Wilson says in his direct examination that he turned over to you and left with you, along with the other goods in the Chititu store, furs to the value of not less than \$4,000—what would you say as to the truth of that statement of Mr. Wilson?

A. Why, it is not a correct account.

Q. I will hand you a paper dated April 1, 1908, and ask you to state what it is. (Handing witness paper.)

A. This is the sales of the furs—the report from the McMillan Company, the McMillan Fur Company.

Q. Will you state whether or not that contains a list of all the furs turned over to you by Mr. Wilson in 1907? A. Yes, and a few more.

(Testimony of H. M. Fagerberg.)

The statement of McMillan & Co. is admitted in evidence without objection, marked Plaintiff's Exhibit "J."

Mr. DIMOND.—Gentlemen of the Jury, I will state that this is the list of furs receipted for by the McMillan Fur Company at Minneapolis, Minnesota. The total amount shown on the bill is \$1,057.14, from which a deduction has been made for express of \$40.50, leaving a net value of \$1,016.64.

Q. Now, Mr. Fagerberg, will you state what proportion of the amount of these furs were your own and what were turned over to you by Mr. Wilson?

A. \$123 is furs I caught myself, personally, and then there was ten skins, lynx skins, that I had bought myself.

Q. What was the value of those lynx skins, if you know?

A. Well, to put a fair price on them, \$8. [335—317]

Q. You bought ten? A. Yes, sir.

Q. That would be a total of eighty dollars?

A. Yes, sir.

Q. Then this value placed upon them by you in the pencil notation on this exhibit "J" is too high—it should be 80 instead of 100? A. Yes.

Q. Where did you get the money to purchase those skins? A. Out of the merchandise.

Q. That you sold up there at the store?

A. Yes, practically taken in trade.

Q. You have also heard Mr. Wilson's testimony that he took out only five or six skins—what have you

(Testimony of H. M. Fagerberg.)

to say as to that? A. It is not a correct statement.

Q. What did he take out?

A. Well, he took out nearly—in the neighborhood of \$450 or \$475 worth.

Q. State what those skins were, if you know.

A. There was one crossed silver gray fox practically worth \$250. There were twelve lynx skins, the best lynx skins there were in the house—he took those out himself.

Q. What was the value of those lynx skins?

A. \$8.00.

Q. What else? A. There were six other skins.

Q. How much were they worth?

A. About ten dollars.

Q. And what else? A. Five beaver.

Q. What was the value of the beaver?

A. About \$6.00. [336—318]

A. Apiece you mean? A. Yes, apiece.

Q. Did he state to you why they were taking these skins out? A. To cover their wages.

Q. What wages do you refer to?

A. From the Nizina Trading Company, what was due them; they had not taken in enough money to cover their salary.

Q. They took the skins out to protect themselves?

A. Yes, sir.

Q. (By JUROR.) Was it sea otter or land otter?

A. It was land otter.

Q. You have heard the testimony of Mr. Range concerning a conversation that he had with you in 1912, in which he states as follows: "It came up with

(Testimony of H. M. Fagerberg.)

regard to their business over there, they had some trouble about their business; he was talking to me about it, Harry Fagerberg was, and I asked him how he was situated over there, and he said he owned a half interest in the whole thing, and that they were trying to beat him out of it, and I said to him, 'that I would take a club and drive them out if I was in his place' ''—did you make such a statement to Mr. Range?

A. I didn't tell him that I owned a half interest in the business—I told him in these words, that I had practically put up half the money to build up the business and I had done the work and didn't intend to be skinned out of it, but I didn't refer to Mrs. Damon when I made the statement that they were trying to beat me out of it.

Q. Whom were you referring to?

A. I was referring to Al and Carstens.

Q. You recollect having this conversation?

A. I do, yes, sir.

Q. Where did it take place? [337—319]

A. At Dan Creek.

Q. What money did you refer to when you mentioned about this money you spoke of?

A. Money I had let them have from my salary.

Q. Now, I wish to call your attention to Defendant's Exhibit "C" attached to the deposition of one of these gentlemen and here offered in evidence. It is entitled Alaska Copper—Alaska United Copper Ex. Co. to Fagerberg Bros. Dr. and dated some time in April, 1913, and ask you to state whether that

(Testimony of H. M. Fagerberg.)

bill was made out by you?

A. The bill was not made out by me.

Q. Do you know who did make it out?

A. I don't know who made the bill out.

Q. Who is the Alaska United Copper Exploration Company?

A. The persons connected with it are Will Steele and Howard Foster.

Q. You signed that, did you?

A. Yes, I signed it.

Q. And you say you didn't make the bill out—it was presented to you in that manner?

A. Yes, it was presented to me in that manner, and I signed it that way and returned it myself.

Q. Where did you get the bill?

A. I don't know where it came from, I don't know who made it out—I was left in charge there by my brother when he was outside and the bill came to me that way and I supposed it was a bill—I didn't know anything about, so I just signed and returned the bill to him.

Q. Signed it in the same manner it was made out?

A. Yes, signed it in the same manner it was made out.

Mr. DIMOND.—That's all. [338—320]

Cross-examination.

(By Mr. RITCHIE.)

Q. As I understand it most of these furs that were shipped to the McMillan Fur Company and catalogued here were furs you bought there and furs you caught? A. No, not most of them.

(Testimony of H. M. Fagerberg.)

Q. A small part of them?

A. A small part of them.

Q. More than half of them were left there by Wilson? A. Yes, sir, more than half of them.

Q. And there were some you bought out of the proceeds of the store sales? A. Yes, sir.

Q. \$123 worth belonged to you? A. Yes, sir.

Q. The total value of all the furs here, not allowing for deductions, is \$1,057? A. Yes, sir.

Q. That is the price the furs brought in Minneapolis, the furs bought by the McMillan Company?

A. Yes, sir.

Q. These furs all belonged to whoever was the owner of the store then, except your share of them?

A. Yes, sir.

Q. I see this statement is addressed to J. A. Fagerberg—they were shipped in J. A. Fagerberg's name?

A. Yes, I believe so.

Q. The business was done rather indiscriminately there in the name of J. A. Fagerberg and Fagerberg Brothers, was it not? A. Rather, yes.

Q. Now on this exhibit that Mr. Dimond just called your attention [330—321] to—exhibit "C," attached to the deposition of Mr. Wilson—you said you did not make it out and that is easy to believe, it is not in your handwriting, but the signature, Fagerberg Bro. per H. M. Fagerberg—all of that is yours, is it not?

A. Yes, I don't deny that at all.

Q. Breedman & Church were paying how much per month up there? A. \$200 per month.

(Testimony of H. M. Fagerberg.)

Q. How much of that rent did you collect personally?

A. I didn't collect any of the rent personally, myself.

Q. It was all paid to Al?

A. It was paid into the bank, Blum & Company.

Q. On account of the mortgage? A. Yes, sir.

Q. Who signed that mortgage?

A. Al signed it and I signed it too.

Q. You both signed it? A. We both signed it.

Q. Signed the notes and mortgage?

A. I don't recollect whether I signed the notes or not—I signed the mortgage.

Q. You are not certain about the notes?

A. I am not certain about the notes.

By the COURT.—Is that all paid for, that indebtedness? A. No, it is not.

By the COURT.—What balance remains?

A. About \$200 and interest.

Mr. RITCHIE.—Is the note held in Cordova?

A. Yes, sir.

By the COURT.—Cut down from \$2,600 to \$200?

A. Yes, sir. [340—322]

(By Mr. DONOHUE.)

Q. That mortgage was originally for \$3,000, or do you remember?

A. I don't just recollect—it seems to me it was \$2,600.

Q. When you took the bill of sale from Al, that is the time you are basing your recollection that it was then \$2,600? A. Yes, sir.

(Testimony of H. M. Fagerberg.)

(By the COURT.)

Q. When was that note and mortgage given, what year? A. 1912.

Q. And what was it for, what was the indebtedness incurred for? A. Merchandise and supplies.

Q. And was it paid off out of the general profits or moneys received in the business? A. Yes, sir.

Q. The roadhouse as well?

A. I suppose it was—I don't know anything about the paying of it, how it was paid, myself, but I imagine it was, but I know about the rent, that the rent applied.

Q. How long did Breedman & Church hold under their lease? A. They had a three-year lease.

Q. How many months did they hold it?

A. From November 1st, practically, 1912 to March 4, 1914.

Q. Then they held for something like sixteen months? A. Yes, sir.

Q. Did they pay \$200 per month rent for sixteen months? A. Yes, sir.

(By Mr. DONOHOE.)

Q. You have testified before that some time in the spring of 1912 you and Al Fagerberg had had a row up there over your wage account [341—323] and Mr. Malcolm Brock drew up a settlement for you under which Al agreed to pay you \$4,000. in full of all of your back salary? A. Yes.

Q. Was it about the time that Malsolm Brock drew up this settlement between you and Al that this mortgage was signed? A. The same time, yes, sir.

(Testimony of H. M. Fagerberg.)

Q. State the circumstances under which you signed that mortgage?

A. Mr. Brock insisted on my signing it—he said my name had been used in the business and he held me as responsible as he would Al—he looked at it that way and I signed it.

(By Mr. RITCHIE.)

Q. When was the last payment made on that note, if you know?

A. Mr. Church made the last payment—you mean on the mortgage?

Q. Yes, on the mortgage to Blum?

A. Church made the last payment, the last month he was there.

Q. There has been nothing paid since then, since Church was there a year ago? A. No.

Witness excused. [342—324]

**[Testimony of J. A. Fagerberg, for Plaintiff
(Recalled in Rebuttal).]**

J. A. FAGERBERG, recalled as witness in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination.

(By Mr. DIMOND.)

Q. You have heard these depositions read?

A. Yes, sir.

Q. I wish to call your attention particularly to the deposition of Thomas Carstens in which he says that along in February, 1911—I will read a little of the deposition so that you may know the particular part I refer to. I am mistaken, it is the testimony of W. C. Prater I am referring to. I will read:

(Testimony of J. A. Fagerberg.)

“Q. What time was that?

A. It was—I think it was along in February, 1911.

Q. Did you have any conversation with him at that time with reference to the store at Chititu?

A. I did.

Q. What was that conversation?

A. He came to the office and said he was not satisfied with the conditions in the way he was operating there, and he did not think it was satisfactory to the company.

Q. To what company?

A. The Carstens Packing Company, or Thomas Carstens. He would like to know where he stood as to the Nizina store, so he would be in a position to handle it as he ought. I asked him if he did not want to buy the store; he said he would buy it, and I asked him what the stock was worth, and he said it was probably worth more than he would give for it, and I asked him what he would give, and he said \$10,000.00, but we would have to trust him for it. I immediately called up Mr. Carstens, and he said to have Mr. Fagerberg come to Tacoma, and he went to Tacoma the next day. What they did I really could not say, as I was not present—”

Q. Now, did any such conversation ever take place between you and Mr. Prater?

A. No, sir, it never did.

Q. Did you ever make him an offer of any kind for this property?

A. No, sir, I never offered him one red cent for it.

Q. Was the first agreement on which you first went in there ever changed in any manner?

(Testimony of J. A. Fagerberg.)

A. No, sir, it was never changed in any manner.

Q. Now, in the testimony of Mr. Carstens he says practically the same thing—his testimony is as follows: [343—325]

“A. I kept after Fagerberg for several years to render a settlement which he promised to make, but he never did, so finally, I believe it was in 1911, or about that time, I made a settlement in which Fagerberg and myself agreed on \$10,000.00.

Q. That is, he was to pay the Nizina Trading Company \$10,000 for that store and the stock of goods therein contained at Chititu?

A. He was to pay \$10,000 for the stock of goods in the store at Chitifu, yes.

Q. Did he ever pay you that \$10,000 or any part of it? A. Nothing, etc.”

Q. Did any such agreement ever take place between you and Thomas Carstens in the spring of 1911?

A. I was never in Tacoma.

Q. Answer the question, yes or no. A. No.

Q. Did you ever have any conversation with Mr. Carstens concerning the sale and purchase of the store at Chititu or any other property up there?

A. No, sir, I did not. In the spring of 1911 I was only two weeks in Seattle and there was only one week I was in touch with Mr. Prater at all.

Q. Did you see Mr. Carstens on that trip at all?

A. No, sir; I did not; I was not even in Tacoma; I didn't have the time; I got to Seattle the 24th of January and left on the 8th of February.

Q. Did you ever tell Mr. Carstens or tell Mr.

(Testimony of J. A. Fagerberg.)

Prater that Harry was a partner of yours in the business?

A. I absolutely never told Tom Carstens or Mr. Prater that Harry was a partner of mine in any transaction whatever.

Q. And they always knew what the real relations were between you?

A. They knew what the real relations were when I went in there in 1907 and at all times; they even knew the relations at Kennecott and my reason for putting the buildings up there.

Q. Did you ever receive a letter from Mr. Carstens or Mr. Prater [344—326] or any officer of the Carstens Packing Company wherein he referred to H. M. Fagerberg as a partner of yours in the business? A. No.

Q. Did you ever receive a letter in which they officially acknowledge that you alone were running the business and they had an interest in the business with you? A. Yes, sir.

Q. I hand you a letter dated July 22, 1912, signed by Carstens Packing Company, Thomas Carstens, and ask you to state what that is—is that Mr. Thomas Carstens' signature? (Handing witness letter.)

A. Yes, sir, it is. It is a letter I received from Tom Carstens dated July 22, 1912.

The letter is offered in evidence, admitted without objection, marked Plaintiff's Exhibit "K," and read to the Jury by Mr. Dimond, as follows:

**Plaintiff's Exhibit "K" [Letter, July 22, 1912,
Carstens Packing Co. to Fagerberg].**

Tacoma, Wash. July 22, 1912.

J. A. Fagerberg,
 Kennecott, Alaska.

Dear Sir:

Received your telegram last night saying to ship without any one in charge. I understand the last cattle went up and the boat people did not make stanchions for them nor did they put them in small pens and room left on the outside by sticking their heads on the outside to eat and drink. This time I will give strict instructions to have them go this way and to feed them on outside instead of where they are laying. If cattle are fed and watered in the same pens where they lay they will not get enough to eat and the feed they get will be wasted, but feeding and watering them on the outside, every bit of hay they will eat will be clean and it will do them lots of good.

The cattle we are shipping you are export cattle and are stall-fed. Grass cattle are not good yet and besides there are none big enough. Lucky I had these on hand and have a few left yet which I am holding on prime feed. Wish you would give me plenty of time when you want any more so as to get them ready.

I could write you a long letter, but see no use of it, but would like to have a personal talk with you regarding your affairs in [345—327] Alaska and if not mistaken believe this talk would result in great benefits to you. From what I can learn from Wolff you are in a position to make lots of money, provid-

ing everything is looked after close and you do business on strictly business lines. You have a first-class name in Alaska. I have talked with a good many miners and business men, and that name alone should see you through and make you money, but some of the same men who have a good opinion of you say in the last year you have been getting a little careless and seem to have trouble. This carelessness should be stopped at once and trouble could be eliminated if you go about it in the right way, for there is no use to do business when all your earnings go to expense, carelessness and other losses which should be stopped at once.

I believe I could help you a great deal if I knew just how you stood and how you do business, but am sure it cannot be done by writing letters. If you had somebody in your place and you could run down here for your next bunch of cattle, I believe it would pay you to come down and see us. You know exactly how we have treated you in the past and how we have trusted you and whether it is your fault or not, it would be some satisfaction for us to have a talk with you and know where we are at. Also whether we can help you any further or not, it is nice to have our confidence and friendship.

By your letter I am not able to tell much how you are doing and how you are getting along. Not getting any statements from you of any kind and not writing us pertaining to our business affairs we are entirely in the dark, but I hope you will admit we should not be, but in order to make lots of money and make a big man out of yourself, you must have our full confidence and cooperation for without that

(Testimony of J. A. Fagerberg.)

goodwill of everybody as a rule a man cannot go far in the world. You are made of the right stuff and I would like to see you get along and little troubles should not destroy what you have worked up for years. We may be able to advise you how to pull out of the hole and come out with flying colors. However we may not, but if you have a chance to come down here and have a talk with us it may do you a lot of good. Let me hear from you.

Respectfully Yours,

CARSTENS PACKING COMPANY,

THOS. CARSTENS. [346—328]

TC-AM.

Cross-examination by Mr. RITCHIE.

Q. Your personal relations with Mr. Carstens were always friendly up to the time you were last in Seattle, a year ago?

A. No, the tift between I and Carstens started in the fall of 1912—when I came out that fall the tift really started between I and Mr. Carstens and the Carstens Packing Company.

Q. It wasn't a serious matter?

A. It was just simply an argument of pros and cons—what had been coming on for years.

Q. Your personal relations with Mr. Carstens were always friendly—were always pleasant?

A. Pleasant, sure —naturally the argument of two men that were partners and dealing the way we had been dealing—

Q. Your relations and mutual confidence were such that in the spring of 1914, you felt warranted in send-

(Testimony of J. A. Fagerberg.)

ing to him for goods and drawing a sight draft for \$1,500 on him? [347—329]

A. Yes, and according to his own statements, under the agreements we had, the understanding we had, why it was perfectly right for me to draw that draft. I considered him in, just the same as I was—he was in the same position and I contend that this very minute, that Thomas Carstens and the Carstens Packing Company is just on the same footing that I am in.

Q. When you left Seattle in February, 1914, he hadn't signed any agreement with you in regard to this new proposition?

A. No agreement then any more than his word of mouth—the only thing I demanded of him in the fall when I went out was that letter.

Q. Now, you are sure, as to these conversations with Mr. Carstens and Mr. Prater, respectively, which you dispute, that they are wholly wrong in the statements they make?

A. Yes, I would swear on a stack of Bibles as high as this house that they are wrong on that talk, that they were in with me all the time, from the very time I took hold of the store that they were in with me on all transactions and they knew the argument when I put up the roadhouse and everything regarding that—they were not deceived in any way, and also in regard to the Krumm property—they induced me to go ahead and do it; I had their absolute confidence, also in regard to the money I got from them that I put into the house in Fourth Avenue, they knew

(Testimony of J. A. Fagerberg.)

every dog gone minute—they knew the conditions that Harry was working under at all times.

Q. As to this disputed conversation with Prater, you are sure your memory is better than his, your friend Bill's?

A. Yes—my memory is as good anyway.

Q. And your recollection of the conversation with Carstens is better than your old friend Tom's?

[348—330] A. It is as good as their's is.

Witness excused.

Testimony closed.

Jury excused until ten o'clock to-morrow morning.

[Motion for a Directed Verdict for Plaintiff, etc.]

By Mr. DONOHOE.—Plaintiff at this time, at the close of all the evidence in this case, moves the Court to direct the jury to find a verdict for the plaintiff in this action, that he is entitled to the possession of the property described in the Amended Complaint and that the jury shall then proceed on the evidence introduced in this trial, to determine by their verdict the value of the property and the amount of damages plaintiff has suffered by reason of being deprived of the property, if they find that the plaintiff has suffered any damages.

After argument by counsel, which was continued during the evening, a recess until eight o'clock having been taken for that purpose, the motion of plaintiff was denied and plaintiff allowed an exception to the ruling.

Whereupon Court adjourned until to-morrow, Thursday, May 13, 1915, at ten o'clock A. M.

Thursday, May 13, 1915. Morning Session.

Mr. RITCHIE.—Will your Honor pass on the motion to amend the Amended Complaint at this time?

[Order Allowing Motion to Amend Amended Complaint.]

By the COURT.—The amendment may be allowed.

To which ruling of the Court plaintiff is allowed an exception. Whereupon, after argument by counsel, the Court delivered his instructions to the jury, as follows: [349—331]

Instructions to Jury.

(By the COURT.)

Gentlemen of the Jury:

In this case the plaintiff by his Amended Complaint claims that the United States Marshal, F. R. Brenneman, by his deputy, James M. Millsap, wrongfully attached and took into his possession certain property, which plaintiff claims belonged to him. Plaintiff claims the value thereof to be \$8,350 and further claims that he is damaged by the wrongful withholding of such property in the sum of \$3,000 and the further sum of \$30 per day as continuing damages during the time same has been withheld from him,

The defendants, in their Answer to the Amended Complaint, allege that the said property was attached under and by virtue of a writ of attachment, issued in the action of Carstens Packing Company versus J. A. Fagerberg, and that the said property attached was, at the time of the attachment, the property of the said plaintiff, H. M. Fagerberg, and J. A. Fagerberg,

who were then and there copartners doing business under the name of Fagerberg Brothers.

The Answer further alleges that a bill of sale given by J. A. Fagerberg on July 15, 1913, to his brother, H. M. Fagerberg, the plaintiff herein, conveying the said property to the plaintiff, was fraudulent and given for the purpose of delaying, cheating and defrauding the creditors of the said firm of Fagerberg Brothers.

The plaintiff, in his Reply, denies that the said deed and bill of sale given by J. A. Fagerberg on the 15th day of July, 1913, to the plaintiff, H. M. Fagerberg, was fraudulent or given for the purpose of delaying, cheating or defrauding any of the [350—332] creditors of the plaintiff or J. A. Fagerberg, and alleges that said deed and bill of sale was given and received for an adequate and valuable consideration.

The main issue to be determined by you, therefore, in this case is very simple, to wit: Did the property in dispute, when it was attached, belong to the plaintiff, H. M. Fagerberg, in his own individual right, or was it partnership property belonging to J. A. Fagerberg and H. M. Fagerberg, doing business as a copartnership by the name of Fagerberg Brothers?

I will give you a few rules with regard to the law on partnership.

A general partnership is a voluntary contract between two or more persons for joining together the money, goods, labor and skill of either or all of them upon an agreement that the gain or loss shall be divided proportionately between them.

The jury are instructed that while as between the

partners themselves a partnership can only be created by agreement of the parties, yet persons who associate themselves together in business and hold themselves out to the world as partners, may be held liable as partners by third persons who have acted upon a reasonable assumption that such partnership existed, as shown by the acts and conduct of the alleged partners.

A dormant or undisclosed partner is liable for contracts made or goods purchased or benefits secured for him by the ostensible partner, and if an ostensible partner purchases [351—333] property on his individual credit for the use of the firm and the vendor or one selling the goods is not aware of the existence of the partnership, he may, when he discovers it, hold the firm liable for the price.

You are instructed that if a third person deals with one or two persons associated together in business, all contracts made with the person with whom the dealings are had are binding upon the associate, so far as he shares in the benefits of the transaction. To state this concretely, the rule means this: That if A and B are doing business together under a private arrangement, known only to themselves, but holding themselves out to the world as a partnership, and C sells goods to A and in A's name only, and the goods are placed in a stock controlled and handled by A and B jointly and B accepts and uses a part of the proceeds and this course of conduct continues for a considerable length of time, any liability arising on the part of A in favor of C by reason of such course of business and such transaction with C, also rests on B, and

B is liable to C the same as A, at least to the extent of the proceeds of such original transaction.

If it be shown that two men engage in business as partners at a certain time, the presumption is justified that they remain partners so long as they remain in business at the same place and in a general way, the same kind of business, unless in the meantime they have given wide public notice of the fact that their relations have changed and what their new relations are to be. [352—334]

Copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks and they incur in all cases joint liabilities, Each copartner is bound for the entire amount due on copartnership contracts, and this obligation is so far several that if he is sued alone and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each.

You are further instructed that if you believe from the evidence that J. A. Fagerberg and H. M. Fagerberg were copartners, then the possession of H. M. Fagerberg in the roadhouse or any other property of the copartnership would be the same as the possession of J. A. Fagerberg and that the partnership property would be subject to levy and attachment in the possession of either of the said partners.

If, however, you believe from a preponderance of the evidence that the plaintiff, H. M. Fagerberg, was the sole owner of said roadhouse and property de-

scribed in the plaintiff's Amended Complaint, then the defendants had no right to seize or take possession of said property under writ of attachment and your verdict should be for the plaintiff.

If you find from the evidence that the plaintiff, H. M. Fagerberg, was not a partner of J. A. Fagerberg during the time mentioned in the pleadings, then I instruct you that the defendants in this action cannot justify the levy on and seizure [353—335] made of the property described in the Amended Complaint, unless you find from the evidence that H. M. Fagerberg held himself out to be a partner or knowingly permitted himself to be held out as a partner of J. A. Fagerberg in said business, and that the Carstens Packing Company had knowledge of such holding out at the time J. A. Fagerberg contracted the indebtedness sued upon in the action in which the writ of attachment was issued, and that the consideration for said indebtedness *were* goods, wares and merchandise used and handled and traded in by said co-partnership.

A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out.

With respect to the bill of sale executed by J. A. Fagerberg to H. M. Fagerberg on July 15, 1913 and recorded in the office of the United States Commissioner at Chitina on August 9, 1913, You are instructed that a transfer of property made by a person

who is insolvent or in failing condition or under circumstances making it important to him to conceal his assets is to be viewed with suspicion and a transfer made by him at such time, particularly to a near relative or person in close business association with him, is presumptively fraudulent.

In this case, if you find from the evidence that after the bill of sale was given by J. A. Fagerberg to H. M. Fagerberg on [354—336] July 15, 1913, no notice of the transfer was given by either party, further than to place it on record in the Commissioner's office at Chitina, and that the said parties continued to conduct business as they had done before, that there was no apparent change of possession of any of the property and all the relations between the said parties and the conditions surrounding their business and management of the property continued as before, you will be justified in finding that whatever relationship existed between the said parties in their business prior to that date, continued to exist.

The Alaska Code provides as follows:

“All deeds of gifts, all conveyances and transfers or assignments, verbal or written, of goods or chattels of things in action made in trust for the person making the same, shall be void as against the creditors existing.”

Circumstances attending fraudulent transfers made to defeat creditors are sometimes said to carry on their face badges of fraud. These badges of fraud do not in themselves constitute fraud, but they are signs or indications upon which its existence may be properly inferred as a

matter of evidence. They are more or less strong or weak according to their own nature and the number concurring in the case. They are as infinite in number and form as are the resources and versatility of human artifice.

20 Cyc. 440.

If a transfer is made by a debtor in suspicion of a suit against him or after a suit has begun and while it is pending against him, this is a badge of fraud. Secrecy is a badge of fraud and so is undue or unusual haste. Evidence of large indebtedness or complete insolvency is an important element in marshalling badges of fraud to overturn fraudulent transfers. The transfer of all or nearly all of his property as a debtor, especially when he is insolvent or greatly embarrassed financially, is a badge of fraud. The unexplained retention or possession [355—337] by the grantor of property transferred is a badge of fraud.

“He who alleges fraud must prove it. It is never presumed. The law does presume, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith, and for an honest purpose, and anyone who alleges that such acts are done in bad faith and for a dishonest purpose takes upon himself the business of showing the same.”

And in this case I instruct you that if fraud is alleged by the defendants in this case, they must establish the alleged fraud to your satisfaction as tested by the foregoing rule before you can find that the transfer from J. A. Fagerberg to H. M. Fagerberg

of the property described in the bill of sale of July 15, 1913, was fraudulently made, or made with a fraudulent intent.

While as just stated, fraud must be proved by the one alleging it, yet this rule is qualified by the further rule of law that certain acts on the part of one making a deed or transfer of his property as above explained to you, constitute what are called badges or evidences of fraud, and when these evidences are sufficiently strong to raise a presumption of fraud, the burden of proof shifts, and the one against whom the fraud is alleged must meet and overcome this presumption of fraud.

You are instructed that if you believe from the evidence that the plaintiff H. M. Fagerberg, and his brother, J. A. Fagerberg, were at the time of the attachment in this case, copartners, [356—338] doing business under the firm name of Fagerberg Brothers, and were, as such, the owners of the property attached, then the plaintiff cannot recover and your verdict must be in favor of the defendants.

If, however, you believe from the evidence and by a preponderance thereof, that said property was solely owned by the plaintiff, H. M. Fagerberg, then your verdict should be for the plaintiff and against the defendants, and you should consider what, if any, damages the plaintiff sustained by reason of the wrongful taking of his property and the withholding thereof.

If you shall find for the plaintiff from a preponderance of the evidence, it will then be your duty to consider the question of damages and in this respect

you are instructed that the measure of damages is the value of the use of the property during the time it was wrongfully withheld from the plaintiff, if you find it was so wrongfully withheld.

You have heard the testimony of the plaintiff as to the value of the use of the roadhouse and the five head of horses attached and from this you will endeavor to ascertain the reasonable amount of damages, if you so find at all.

Damages may not be estimated by mere guesswork or conjecture, but must be based upon substantial facts and evidence justifying the same. Remote or speculative damages and future profits are not to be considered, except in so far as they are reasonably deduced from the testimony, tending to prove actual damages to the plaintiff, flowing from the wrongful attachment and the withholding of plaintiff's property. [357—339]

You are instructed that you are the sole judges of the credibility of the witnesses and of the effect and value of the evidence, but your power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

You are further instructed that you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

You are instructed that a witness willfully false in one part of his testimony may be distrusted in others.

You are instructed that the oral admissions of a party are to be viewed with caution, for the reason that one may misunderstand what is intended to be said or place a wrong construction upon what is claimed to be an oral admission.

You are instructed that the one having the affirmative of an issue, in this case the plaintiff, has the burden upon him of proving his case by a preponderance of the evidence. In a criminal case the charge must be proven beyond a reasonable doubt, but in a civil case the one having the burden is required only to prove it by a preponderance of the evidence; this means that where the scales are about evenly balanced and you are unable to determine which may be in the right, you will resolve such doubt against the one having the affirmative of the proposition. [358—340]

In determining the credit you will give a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness on the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against the defendant; the probability or improbability of the statements of the witness; the opportunity he had to observe and to be informed as to the matters respecting which he gave testimony before you; and the inclination he evinces, in your judgment, to speak the truth or otherwise, as to the matters within the knowledge of such witness.

You are instructed that you should not consider any evidence sought to be introduced but excluded by

the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you, not derived from the evidence as given by the witnesses upon the witness stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the Court. Whatever is warranted under the evidence and the instructions of the Court, you should return, as you have sworn to do.

You are instructed that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce [359—341] and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence should be viewed with distrust.

You are instructed that in considering the evidence in this case you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses, when their evidence does not produce conviction in your minds, against a lesser number of witnesses, or a presumption, or other evidence which is satisfying to your minds. The weight of the evidence does not depend so much upon the number of witnesses who testify as upon the character and probability of the facts stated by them, and upon the character and reasonableness of their testi-

mony, and the opportunity the witnesses had for seeing and knowing the facts stated by them.

It is your duty to give to the testimony of each and all of the witnesses such credit as you consider their testimony justly entitled to receive; and in doing so you should not regard the remarks or expressions of counsel, unless the same are in conformity with the facts proved, or are reasonably deductable from such facts and the law as given to you in these instructions.

Two forms of verdict are herewith submitted to you as follows:

We, the jury, duly empaneled and sworn to try the above-entitled cause, find that the plaintiff is the owner of all [360—342] of the property described in his amended complaint, and was on the 6th day of August, 1914, and ever since has been and now is entitled to the possession of all of said property; and that he is now entitled to the return of said property from said defendants and each of them. And we find the value of the log buildings used as a hotel or roadhouse at Blackburn, Alaska, together with the two storehouses adjoining said roadhouse or hotel, all of which is described in the complaint, to be the sum of —— dollars; the value of the tents, barns and blacksmith-shop described in said complaint to be the sum of —— dollars; the value of the horses described in said complaint to be the sum of —— dollars; the value of all other personal property mentioned in said complaint and particularly described in the schedule attached thereto to be the sum of —— dollars. And in case that the delivery of said

property, or any part thereof, cannot be made to the plaintiff, we find that plaintiff is entitled to a judgment against said defendants and each of them for the value of such portion of the property as heretofore assessed as cannot be returned.

We further find that plaintiff has been damaged by reason of the wrongful taking and detention of said property by the defendants and assess his damages at the sum of ——— dollars.

Dated at Valdez, Alaska, this 13th day of May, 1915. Should you find this verdict, you will insert in each of the blank places here, the amounts which you find to be proper.

The second general verdict is a verdict as follows:

We, the jury, duly empaneled and sworn in the above-entitled [361—343] cause do find for the defendants on all the issues.

That is a general verdict in favor of the defendants.

There are also submitted to you three special questions of findings, and you will answer the first two of said questions yes or no, and the third question answer as you may find. The questions are:

1. Was H. M. Fagerberg on the 6th day of August, 1914, the sole and lawful owner of the property described in the amended complaint, that is, the Blackburn roadhouse, furniture and equipment, the barns and outbuildings, and the horses, harnesses, sleds, etc., as set forth in Plaintiff's Exhibit "A," attached to the amended complaint?

2. Was there a partnership existing between H. M. Fagerberg and J. A. Fagerberg at any time previ-

ous to the 6th day of August, 1914?

3. Should you find that there was such a partnership, state when it begun and when it terminated.

These verdicts you will take with you to your jury-room and when you have unanimously agreed upon a verdict and upon the answers to these questions, you will sign the verdict which you find by your foreman, and return the same into court. The instructions you will also take with you to your jury-room, for your guidance and also the exhibits in the case.
[362—344]

[Exceptions to Refusal of Court to Give Certain Instructions.]

Mr. RITCHIE.—The defendants desire to except to the refusal of the Court to give that part of Instruction Number 5 asked by the defendants which is indicated by a pencil bracket in the margin. I am not sure that that is covered—it is probably partly covered by another, but not fully covered and in order to save the point I wish to except at this time.

Defendants also desire to except to the refusal of the Court to give Instruction Number 6 requested by defendants.

Exception allowed in each case.

The part of Instruction Number 5 referred to by counsel is as follows:

“You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership.

In this case if you find that the Blackburn

roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time, you are entitled to consider the facts regarding possession as making a prima facie case of ownership in J. A. Fagerberg.” [363—352]

**[Stenographer's Certificate to Transcript of
Evidence and Proceedings.]**

I do hereby certify that I am the official court stenographer of the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings had in the trial of the above-entitled cause, to wit, H. M. Fagerberg vs. F. R. Brenneman, U. S. Marshal, et al.; that the above is a full, true and correct transcript of the evidence produced and proceedings had at said trial.

Dated at Valdez, Alaska, this — day of —, 1915.

————— [364]

**[Plaintiff's Exhibit "F"—Complaint (Carstens
Packing Co. vs. J. A. Fagerberg).]**

*In the District Court for the Territory of Alaska,
Third Division.*

No. 682.

CARSTENS PACKING COMPANY, a Corporation,
Plaintiff,

vs.

J. A. FAGERBERG,

Defendant.

For his first cause of action against defendant plaintiff says:

I.

Plaintiff is a corporation, duly organized under the laws of the State of Washington, and doing business in the Territory of Alaska, and was such corporation at all times hereinafter mentioned.

II.

That on the 3d day of July, 1914, the Superior Court of King County, State of Washington, was a court of general jurisdiction, duly created and organized by the laws of the said State.

III.

That on the — day of February, 1913, plaintiff commenced an action in said Superior Court of King County, State of Washington, against the defendant herein by due service of process upon him according to the laws of said State. That such process was duly and personally served upon said defendant within the jurisdiction of said Superior Court. That thereafter, to wit, on the 23d day of March, 1913, the default of said defendant for pleading, or appearance in said action was duly entered in said court. That thereafter, such proceedings were had in said cause that on the 3d day of July, 1914, judgment for the sum of [365] Twenty-six Hundred Fifty-one and 72/100 Dollars (\$2651.72) was duly given and entered by said Court in favor of the plaintiff and against the defendant; that said judgment draws interest from its date at the rate of six per cent (6%) per annum until paid.

IV.

That no part of said judgment has been paid and the whole sum is now due and payable.

For a second cause of action against defendant plaintiff says:

I.

Plaintiff is a corporation, duly organized under the laws of the State of Washington, and doing business in the Territory of Alaska, and was such corporation at all times hereinafter mentioned.

II.

That between the 10th day of March, 1914, and the 12th day of June, 1914, the plaintiff sold and delivered to the defendant goods, wares and merchandise at the agreed price and of the agreed value of Forty-one Hundred Seventy and 97/100 Dollars (\$4,170.97).

III.

That no part of said sum has been paid except the sum of One Hundred Forty-eight and 22/100 Dollars (\$148.22).

IV.

That there is now due and owing to plaintiff from defendant on said account, the sum of Four Thousand Twenty-two and 75/100 Dollars (\$4,022.75), with interest thereon at the legal rate from June 12, 1914.

WHEREFORE, plaintiff asks judgment against defendant for the sum of Twenty-six Hundred Sixty-three and 66/100 Dollars (\$2,663.66) on its first cause of action and for the sum of Four Thousand Sixty-five and 66/100 Dollars on its second

cause of action, a total of Six Thousand Seven Hundred Twenty-nine and 32/100 Dollars [366] (\$6,729.32), with interest on said separate sums as hereinbefore stated and for the costs of this action.

C. E. BUNNELL,

JOHN LYONS and

E. E. RITCHIE,

Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

E. E. Ritchie, being first duly sworn, deposes and says that he is attorney for plaintiff in this action; that he makes this verification in behalf of the plaintiff for the reason that plaintiff is a foreign corporation with its principal officers nonresidents of the Territory of Alaska, and now absent therefrom; that he has read the foregoing Complaint and believes the same to be true.

E. E. RITCHIE.

Subscribed and sworn to before me this 31st day of July, A. D. 1914.

[Seal]

THOS. P. GERAGHTY,

Notary Public for Alaska.

My commission expires Feb. 15, 1915.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 31, 1914. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [367]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAS. M. MILLSAP, Deputy United States
Marshal,

Defendants.

Verdict.

We, the jury, duly empaneled and sworn to try the above-entitled cause, find that the plaintiff is the owner of all of the property described in his amended complaint, and was on the 6th day of August, 1914, and ever since has been and now is entitled to the possession of all of said property; and that he is now entitled to the return of said property from said defendants and each of them. And we find the value of the log buildings used as a hotel or roadhouse at Blackburn, Alaska, together with the two storehouses adjoining said roadhouse or hotel, all of which is described in the complaint, to be the sum of Two Thousand (\$2,000) Dollars; the value of the tents, barns and blacksmith-shop described in said complaint to be the sum of One Thousand (\$1,000) Dollars; the value of the horses described in said complaint to be the sum of One Thousand (\$1,000) Dollars; the value of all other personal property men-

tioned in said complaint and particularly described in the schedule attached thereto to be the sum of One Thousand (\$1,000) Dollars. And in case that the delivery of said property or any part thereof cannot be made to the plaintiff we find that plaintiff is entitled to a judgment against said defendants and each of them for the value of such portions of the property as heretofore [368] assessed as cannot be returned.

We further find that plaintiff has been damaged by reason of the wrongful taking and detention of said property by the defendants, and assess his damages at the sum of Four Thousand Seven Hundred Twenty-five Dollars (\$4,725).

Dated at Valdez, Alaska, this 13th day of May, 1915.

GEORGE LACY,
Foreman.

[Endorsed as follows]: Filed in the District Court, Territory of Alaska, Third Division. May 13, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 128. [369]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAS. M. MILLSAP, Deputy United States
Marshal,

Defendants.

Special Findings Requested by Plaintiff and Defendants.

I.

Was H. M. Fagerberg on the 6th day of August, 1914, the sole and lawful owner of the property described in the amended complaint, that is, the Blackburn roadhouse, furniture and equipment, the barns and outbuildings, and the horses, harnesses, sleds, etc., as set forth in Plaintiff's Exhibit "A," attached to the amended complaint?

He was.

II.

Was there a partnership existing between H. M. Fagerberg and J. A. Fagerberg at any time previous to the 6th day of August, 1914?

There was not.

III.

Should you find that there was such a partnership, state when it began and when it terminated. [370]

Dated at Valdez, Alaska, this 13 day of May, 1915.

GEORGE LACY,
Foreman.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. May 13, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 129. [371]

*In the District Court for the Territory of Alaska,
Third Division.*

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAS. M. MILLSAP, Deputy United States
Marshal,

Defendants.

Motion for New Trial.

Now come the defendants by their attorneys, Lyons & Ritchie, and move the Court for an order setting aside the verdict and special findings returned by the jury in this cause, and to grant a new trial of the action upon the following grounds:

I.

That the valuation of the property fixed by the jury and the allowance of damages on account of the attachment complained of herein, made by the jury, are excessive; appearing to have been given under the influence of passion and prejudice.

II.

That the evidence adduced in the trial was wholly insufficient to justify the verdict and findings and that said verdict and findings are against law.

III.

Errors in law occurring at the trial and excepted to by the defendants at the time as follows:

A. The Court erred in admitting the testimony of H. M. Fagerberg, over the objection of defend-

ants, as to the probable profit he might have made by operating the Blackburn roadhouse and by use of the horses claimed by him, for the reason that all the testimony offered referred wholly to speculative profits, based upon evidence and opinions of said H. M. Fagerberg as to probable business, and none of it offered [372] specific facts and figures, showing assured business taken away from plaintiff by reason of said attachment.

Further, all such testimony was incompetent, irrelevant and immaterial for the reason that the testimony offered by plaintiff himself shows that prior to the attachment, he was working for J. A. Fagerberg for a salary of \$100.00 per month and had all the property, now claimed by him, leased to said J. A. Fagerberg for an indefinite period, as shown by the written contract introduced in evidence by plaintiff, and, therefore, the attachment did not interfere with or break off any business whatsoever that he was engaged in on his own account and all of the evidence offered by plaintiff was intended to show damages and destruction of his own personal business.

Further, plaintiff failed to show by any evidence that either the freighting or roadhouse business done by J. A. Fagerberg prior to the attachment or in prospect after the time of the attachment, was sufficient to enable him to pay to plaintiff any part of any of the sums called for by the lease from plaintiff to J. A. Fagerberg, and plaintiff admitted that up to the time of the attachment, he had received nothing on account of said lease, except his personal expenses.

B. The Court erred in refusing to give to the jury instruction No. 5, asked by defendants, as follows:

“You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership.

In this case if you find that the Blackburn roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time you are entitled to consider the facts regarding possession as making a *prima facie* case of ownership in J. A. Fagerberg.”

C. The Court erred in refusing to give to the jury instruction No. 6 asked by defendants, as follows:

“You are instructed that in seizing the property attached by him in the case in which the writ complained of was issued, the marshal and his deputy were merely discharging their duty to serve process in their hands; that said [373] writ directed them to seize sufficient property to secure the possible judgment and costs that might be recovered in the case, with a reasonable allowance for depreciation in value incident to the seizure and sale.

The marshal had also a right to seize any property in which H. M. Fagerberg had an interest.”

LYONS & RITCHIE,
Attorneys for Defendants.

Service of copy admitted this 17th day of May, 1915.

DONOHUE & DIMOND,
Attorneys for Plaintiff.
By ANTHONY J. DIMOND.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 17, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [374]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAS. M. MILLSAP, Deputy United States
Marshal.

Order Denying Motion for New Trial.

The motion of defendants for a new trial in the above-entitled cause came on regularly for hearing this 19th day of May, 1915, the plaintiff being represented by his attorneys, Donohue & Dimond, and the defendants by their attorneys, Lyons & Ritchie, and the Court after hearing the said motion, and the arguments of counsel, for the respective parties, and being fully advised in the premises, announced that in the opinion of the Court, the damages fixed by the jury in the verdict of four thousand seven hundred and twenty-five dollars for the wrongful taking and detention of the property described in plain-

tiff's amended complaint were excessive, and that in the opinion of the Court the sum of three thousand dollars would be just and equitable as such damages, whereupon, plaintiff announced in open court that he was willing to accept the said sum of three thousand dollars as such damages.

NOW, THEREFORE, IT IS ORDERED, that said motion for a new trial be and the same is hereby denied; and it is further ordered that the verdict of the jury as to damages for the wrongful taking and detention of the property described in the amended complaint in this action, be and the same is hereby modified by reducing the amount thereof from four thousand seven hundred twenty-five dollars to the sum of three thousand dollars, and that judgment be entered for plaintiff and against defendants and each of them accordingly. To which order of the Court the defendants then and there excepted. [375]

Done in open court at Valdez, Alaska, this 19th day of May, 1915.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 20, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, Page No. 138. [376]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAS. M. MILLSAP, Deputy United States
Marshal,

Defendants.

Judgment.

This action came on regularly for trial, plaintiff appearing in person and by his attorneys, Donohoe & Dimond, and the defendants appearing by their attorneys, Lyons & Ritchie, a jury of twelve persons was duly and regularly empaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing all the evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict, and subsequently on the 13th day of May, 1915, returned into court with the verdict signed by the foreman, and after being called, answered to their names and said:

“We, the jury, duly empaneled and sworn to try the above-entitled cause, find that the plaintiff is the owner of all the property described in his amended complaint, and was on the 6th day of August, 1914, and ever since has been and now is entitled to the possession of all said property; and that he is now entitled to the return of said property from said

defendants and each of them. And we find the value of the log buildings used as a hotel or roadhouse at Blackburn, Alaska, together with the two storehouses adjoining said roadhouse or hotel, all of which is described in the complaint, to be the sum of Two Thousand (\$2,000) Dollars; the value of the tents, barns and blacksmith-shop described in said complaint to be the sum of One Thousand (\$1,000) Dollars; the value of the horses described in said complaint to be the sum of One Thousand (\$1,000) [377] Dollars; the value of all other personal property mentioned in said complaint and particularly described in the schedule attached thereto to be the sum of One Thousand (\$1,000) Dollars. And in case that the delivery of said property or any part thereof cannot be made to the plaintiff, we find that plaintiff is entitled to a judgment against said defendants and each of them for the value of such portion of the property as heretofore assessed as cannot be returned.

We further find that plaintiff has been damaged by reason of the wrongful taking and detention of said property by the defendants, and assess his damages at the sum of Four Thousand Seven Hundred Twenty-five (\$4,725) Dollars.

Dated at Valdez, Alaska, this 13th day of May, 1915.

GEORGE LACY,
Foreman."

And thereafter the defendants filed herein a motion for a new trial, which came on regularly for hearing on the 19th day of May, 1915, and the Court,

with the consent of the plaintiff, having reduced the damages given by the jury in said verdict from four thousand seven hundred twenty-five dollars to the sum of three thousand dollars, and thereupon the Court by order duly made and entered denied said motion for a new trial.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid it is ORDERED, ADJUDGED and DECREED, that the plaintiff is the lawful owner and entitled to the immediate possession of the following described property: That certain roadhouse, together with the appurtenances, the land about said roadhouse and upon which said roadhouse is situate, being two acres, more or less, all furniture and equipment in said roadhouse, and all barns and outbuildings in connection therewith, the said property being situate at what is known as the Town of Blackburn, Alaska, at mile 192 of the Copper River and Northwestern Railway, within the Third Division of the Territory of Alaska, the said property and premises being commonly known as the "Blackburn Roadhouse"; also, five head of horses, and harnesses, saddles, sleds, wagon and general equipment, the said property being described more particularly and in detail as follows: [378]

2 acres of land, more or less, of land on which roadhouse stands.

One log building—Roadhouse.

1—34x32L—2 floors and attic.

1—20x40—Main building—2 floors and attic.

1 storeroom joining on North side, 19x30.

1 storeroom joining on South, 18x30.

Tents, barns, etc.:

1—16x29—10oz. tent.

1—13x22 log cabin, blacksmith-shop.

1—37x47 stable, logs.

1—15x18, approximately, log barn.

1—cache tent, 16x32, with floor.

Furniture, Hotel Lobby:

2 window-shades.

4 straight-back chairs.

2 Morris chairs.

1 oak rocker.

1 air-tight heater.

1 water-cooler.

1 oak settee.

1 oak Morris chair.

1 oak library chair.

1 fire-extinguisher.

Hallway:

1 16x18 linoleum.

1 foot rug.

1 window-shade.

3 straight-back chairs.

1 fire-extinguisher.

1 wall lamp.

Linen Closet:

21 sheets.

4 roller towels.

8 bath towels.

3 bed spreads.

23 face towels.

15 pillow cases.

Dining-room:

- 3 fire-extinguishers.
- 1 20-inch Empire heater.
- 1 large dining-room table.
- 4 yds. oilcloth on table.
- 4 pair window curtains.
- 1 pitcher.
- 8 oil and vinegar cruets.
- 2 toothpick-holders.
- 1 berry glass dish.
- 13 dining-room chairs.
- 18x22 oilcloth.
- 1 small dining-table.
- 1 table-cover.
- 2 window-shades.
- Telephone.
- 2 sugar-bowls.
- 1 salt-and-pepper shaker.

Kitchen:

- 13 China cups.
- 4 syrup pitchers.
- 2 gravy dishes.
- 2 berry dishes.
- 7 pickle dishes.
- 5 mixing pans.
- 2 granite pitchers.
- 2 large wash-basins.
- 18 dinner plates.
- 6 small platters.
- 11 vegetable dishes.
- 10 dessert plates.
- 16 Roger Bros. knives.

- 7 tablespoons.
- 2 butter knives.
- 1 range.
- 2 large coffee-pots.
- 1 double boiler.
- 3 bake pans.
- 1 tea-kettle.
- 2 cake cutters.
- 1—2-gallon ice-cream freezer.
- 1 waffle-iron.
- 1 broom.
- 1 dustpan.
- 3 kitchen tables.
- 1 wall sideboard.
- 1 kitchen cupboard.
- 1 egg-beater.
- 1 corkscrew.
- 1 potato-reeder.
- 1 can-opener.
- 22 saucers.
- 4 granite saucers.
- 16 water glasses.
- 2 large syrup pitchers.
- 18 granite mixing-pans, various sizes.
- 6 granite soup bowls.
- 1 basin strainer.
- 3 vegetable mashers.
- 7 large platters.
- 12 butter dishes. [379]
- 15 soup plates.
- 21 soup spoons.
- 13 teaspoons.

- 18 forks.
- 2 large stock-pots.
- 3 skillets.
- 1 toaster.
- 1 large fork.
- 1 small dish-pan.
- 1 pr. tin snips.
- 1 pancake turner.
- 1 steel.
- 1 poker.
- 1 roller towel.
- 1 clawhammer.
- 2 window-shades.
- 2 dish towels.
- 24 water glasses.
- 1 milk pitcher.
- 1 glass pitcher.
- 1 spoonholder.
- 1 wash-basin.
- 8 mush bowls.
- 3 olive dishes.
- 3 sugar spoons.
- 1 skimmer.
- 1 small strainer.

Pantry:

- 1—24-in. bread pan and cover.
- 1—1-gal. earthen bean-baker.
- 1—3-gal. crock.
- 1 granite iron ladle.
- 1—1-gal. vegetable strainer.
- 6 bake pans.
- 10 biscuit and cake cutters.

- 6 cake tins.
- 18 pie tins.
- 1 muffin pan.
- 1 corn popper.
- 2 milk strainers.
- 1 meat chopper.
- 5 bit cleavers.
- 1 wall lamp.
- 1 window-shade.
- 2 mixing tables.
- 1 cupboard.

Cook Room:

- 4 Rochester lamps.
- 1 bracket lamp.
- 2 new brooms.
- 1 window-shade.
- 1 folding cot.
- 2 prs. cotton blankets.
- 1 sheet.
- 1 chair.
- 2 water-pitchers.
- 1 tea-pot.
- 1 toothpick-holder.
- 3 flour sifters.
- 1 serving tray.
- 8 toothpick-holders.
- 6 salt-and-pepper shakers.
- 1 set red portieres.
- 1—5x7 linoleum.

Room No. 1:

- 1 iron bed and spring and mattress.
- 2 sheets.

- 1 four-pound blanket.
- 1 quilt.
- 1 bedspread.
- 1 pillow.
- 1 foot rug.
- 1 slop-bucket and cover.
- 1 wash-bowl and pitcher.
- 1 soap dish.
- 1 glass.
- 1 looking-glass.
- 1 portiere and 1 rug.

Room No. 2:

- $\frac{3}{4}$ spring mattress.
- 1—6-lb. gray blanket.
- 1 quilt, 1 bedspread, 2 pillows.
- 1 foot rug, 1 bedspread, 1 slop-bucket and cover.
- 1 wash-bowl, 1 chair, glass, 1 water-pitcher.
- 1 towel, 1 soap dish, 1 candlestick, 1 looking-glass.
- 1 window-shade.

Room No. 3:

- 1— $\frac{3}{4}$ mattress, spring and bedstead, 2 sheets,
- 1—4-lb. blanket, quilt, spread, 1 chair, 1 pillow,
- 1 table, 1 carpet, 1 slop-jar, 1 bowl, 1 soap dish,
- 1 candlestick, 1 looking-glass, 1 window-shade,
- 2 towels, washstand, 1 blanket, 1 quilt, 1 pr. curtains,
- 1 window-shade, 1 towel.

Room No. 4:

- 2 quilts, 1 pr. blankets, 2 pillows, 2 pillow-cases,
- 2 sheets, 1— $\frac{3}{4}$ mattress, 1 spread, 1— $\frac{3}{4}$ bed and
- spring, 1 slop-bucket and cover, 1 wash-bowl,
- 1 water pitcher, 3 towels, 1 table, 1 carpet rug,
- 1 chair, 1 looking-glass, 2 window-shades, 1 pr.

curtains, 1 granite soap dish, 1 water glass, 1 candlestick. [380]

Room 5:

1 single iron bed and spring, 1 mattress, 2 sheets, 1 blanket, 1 quilt, 1 spread, 1 pillow, 1 foot rug, 1 slop-bucket and cover, 1 stand, wash-bowl and pitcher, 1 candlestick, 1 soap dish, 2 window-shades, 1 pr. curtains and rod, 2 towels, 1 looking-glass, 1 chair.

Room 6:

1— $\frac{3}{4}$ bed, spring and mattress, 2 sheets, 1 blanket, 1 quilt, 1 spread, 1 pillow and case, 1 foot rug, 1 slop-bucket and cover, 1 stand, 1 pitcher and bowl, 1 soap dish, 1 candlestick, 1 looking-glass, 3 towels, 1 window-shade, 1 chair.

Room No. 7:

1— $\frac{3}{4}$ bed and spring and mattress, 2 sheets, 1 blanket, 1 quilt, 1 spread, 2 pillows, 1 foot rug, 1 slop-bucket and cover, 1 chamber, 1 wash-bowl and pitcher, 1 soap dish, 1 candlestick, 1 glass, 1 looking-glass, 3 towels, 1 window-shade, 1 chair, 1 washstand.

Room No. 8:

1 single iron bed and spring, 1 mattress, 2 sheets, 1 pillow, 1 blanket, 1 quilt, 1 spread, 1 foot rug, 1 slop-bucket, 1 washstand, 1 pitcher and bowl, 1 soap dish, 1 candlestick, 1 looking-glass, 2 towels, 1 window-shade, 1 chair.

Room No. 9:

1 iron bed and spring, 1 mattress, 2 sheets, 1 blanket, 1 quilt, 1 spread, 2 pillows, 1 rug, 1 washstand, 1 slop-bucket and cover, 1 wash-bowl

and pitcher, 1 soap dish, 1 candlestick, 1 curtain, 1 looking-glass, 1 writing table and cover, 1 towel, 1 pr. window curtains, 1 shade, 2 chairs.

Room No. 10:

1— $\frac{3}{4}$ iron bed and spring, 1 mattress, 1 blanket, 1—3-lb. blanket, 3 pillows, 1 quilt, 1 rug, 1 washstand, 1 pitcher, 1 bowl, 1 slop-bucket, 1 water-pitcher and glass, 1 soap dish, 4 towels, 1 candlestick, 1 looking-glass, 1 pr. curtains, 1 window-shade, 1 chair.

Room No. 11:

1 folding cot and spring, 1 mattress, 2 sheets, 1 spread, 1 blanket, 1—10-lb. blanket, 1 pillow, 1 window-shade, 1 window curtain, 1 slop-bucket, 1 pitcher and bowl, 1 soap dish, 1 water-pitcher, 1 looking-glass, 1 brussels carpet-sweeper, 1 broom, 1 chair, linoleum.

Room No. 14:

1— $\frac{3}{4}$ iron bed and spring, 1 mattress, 2 sheets, 1 quilt, 1 spread, 2 pillows, rug, 1 chair, 6 towels, 1 chiffonier glass, 1 washstand, 1 slop-bucket and cover, 1 pitcher, 1 bowl, 1 water glass, 1 window-shade, 1 lace curtain, 1 chair.

Room No. 12:

1— $\frac{3}{4}$ iron bed and mattress, 2 pillows and cases, 1 single blanket, 1 washstand, 1 slop-bucket and cover, 1 wash-bowl and pitcher, 1 toothbrush-holder, 2 window-shades, 1 dressing table with glass, 1 chiffonier, 1 chair, 1 ingrain carpet, 2 prs. curtains.

Room No. 15:

1 bookcase, 1 library table, 1 rocking chair, 1

chair, 1 tablet, 1 heating stove, 1 rug, 2 window-shades, 2 window curtains.

Main Hallway—Second Floor:

2 wall lamps and reflectors, 96 feet cocoa matting.

Front Attic:

4 single iron beds and springs, 3 mattresses, 3 wood bedsteads, [381] 12 mattresses, 3 springs, 5 quilts, 7 sheets, 5 light blankets, 6 pillows, 1 bucket, 1 dipper and wash-bowl, 1 soap dish, 1 towel, 2 window-shades.

Back Attic:

9 cotton blankets, 1 gray blanket, 1 blanket, 2 double mattresses, 2 single mattresses, 2 single iron beds and springs, 5 slop-buckets and covers, 4 pillows and pillow cases, 19 prs. new pillows.

Tent Cache:

5 sets horseshoes. 1 electric battery; 2 meat-saws, without blades; 1 coffee-mill, 4 kegs assorted horseshoes, 1 scythe and snathe, 2 dish-pans, 1 mop-bucket, 1 wash tub, 1 hand axe, 2 rakes, 1 hoe, 1 fire-extinguisher, 1 handsaw, 1 blacksmith hammer, 1 pr. nippers, 2 lanterns, 1 mop, 1 neverslip wrench, 2 water-buckets, 1 dipper, 1 stove brush.

Blacksmith-shop:

130 new horseshoes, various kinds and sizes; 22 feet binding chain, 3 singletrees, 1—2-inch auger, 6 bits, 2 jackplanes, 4 packsaddles, 1 hack saw, 1 filing set, hand saw, 1 vise, 2 four-pound hammers, 2 old double bit axes, 1 mattock, 1 single spreader, 12 feet one inch drill steel, 14 feet $\frac{5}{8}$ square iron, 6 feet $\frac{3}{4}$ round iron, 1

horse collar, 1—80-lb. anvil, 1 No. 6 blast forge, 2 blacksmith tongs, 3 horseshoe tongs, 2 handle punches, 2 cold iron cutters, 8 punches, 2 cold chisels, 1 nail puller, pole axe, 1—6-inch monkey-wrench, 2 neverslip wrenches, 3 horseshoe rasps, 1 leather punch, 1 kit harness tools, 1—12-inch grindstone, 1 soldering iron, 1 tin snips, 1—24-inch air-tight heater, 25 feet wire fence, 2 meat saws, no blade; harness snaps, 6; 1 Mitchell wagon, 1 chicken-house.

Upstairs in Barn:

1 Yukon stove, 36x22; 3 towels, 3 coffee pots, 1 granite saucepan, 7— $1\frac{1}{2}$ -gal. fruit jars, 1 granite syrup pitcher, 1 six-drawer oak desk and revolving chair, 1 whipstock, 1 steamer chair, 1 mattress, 1 quilt, 1 table, 1 lamp, 1 Miller lamp.

Hotel Warehouse:

1— $21\frac{1}{2}$ -lb. pole axe, 1 hand saw, 1—24-in. heater, shelving, 1 6-foot bottom locker.

Barn Loft:

5 No. 2 short handled shovels, 1 ten-pound rock hammer, 14 ft. one-inch drill steel, 1—14-lb. rock hammer, 12 mattox, 2—8-lb. drill-hammers, 1 drill-wrench, 1 sheet corrugated iron, 8x2; 2 pieces drill steel 12 feet long, 9 single harnesses, 1 set double harness, 5 single back bands, 9 collars for horses, 5 blindbridles.

Barn Downstairs:

2 riding saddles, 4 openwork bridles, without snaps, reins, 4 horse blankets, 5 pack saddles and Humboldts, 2 Humboldts, 17 saddle blankets, 2 sets heavy single harness, 1 set double harness

complete, 4 horse collars with sweat pads, 1 neck yoke, 1—2½-lb. axe, 1 singletree, 1 new pack tree, 1 pack saddle, 1 curry comb, 1 brush, 2 nose-bags, 5 chicken coops, 1—3½lb. pole axe, 1 5-in. horse syringe, 1 horse bucket, 4 set double harness.

Miscellaneous:

- 1 slicker, 2 No. 4 sleds, 1 double-ender without shafts, 1 cord wood, 2 coils insulated copper wire, 1 pr. old shafts, 3—4x4's, 14 feet long.

Horses:

- 1 horse, weight about 1600, color black, age 12 years, name "Nig."
- 1 Horse, weight about 1600, color brown, age 12 years, name "Tom."
- 1 Horse, weight about 1100, color brown, age 10 years, name "Brownie."
- 1 Horse, weight about 1300, color gray, age 10 years, name "Dicky."
- 1 Horse, weight about 1000, color bay, age 10 years, name "Lady." [382]

That the value of said property is as follows: The log building used as a hotel or roadhouse at Blackburn, Alaska, together with the storehouse adjoining said roadhouse, all of which is heretofore described, is of the value of two thousand dollars (\$2,000.00); the tents, barns and blacksmith-shop heretofore described are of the value of one thousand dollars (\$1,000.00); the five head of horses heretofore described are of the value of one thousand dollars (1,000.00); all of the other personal property heretofore described is of the value of one thousand dollars (\$1,000.00).

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendants immediately deliver to the plaintiff all of the above-described property, and in case the delivery of said property, or any part thereof, is not immediately made to the plaintiff, then that plaintiff do have and recover of and from said defendants and each of them the value of such portion or portions of said property, as heretofore set out, which is not delivered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff do have and recover of and from said defendants and each of them the sum of three thousand dollars (\$3,000.00), lawful money of the United States of America, as damages for the wrongful taking and detention of said property from plaintiff by the said defendants, with interest thereon at the rate of eight per centum per annum from date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, in the sum of ——— dollars, (\$——), to be taxed by the clerk of this court and inserted in this judgment.

Let execution issue in accordance with this judgment.

Done in open court at Valdez, Alaska, this 21st day of May, A. D. 1915.

FRED M. BROWN,
Judge.

[Endorsements]: Filed in the District Court Territory of Alaska, Third Division. May 21, 1915. Arthur Lang, Clerk By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 139. [383]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs

F. R. BRENNEMAN, U. S. Marshal and JAMES M.
MILLSAP, Deputy U. S. Marshal,
Defendants.

**Minute Order Extending Time to Settle and Prepare
Bill of Exceptions and Staying Execution.**

On motion of defendants, it is ordered by the Court here that defendants be granted ninety days from this date in which to prepare and settle Bill of Exceptions herein, and

IT IS FURTHER ORDERED that execution on plaintiff's judgment be stayed during said period of ninety days.

February, 1915, term—June 22d—66th Court Day—Tuesday.

Entered Court Journal No. 9, page 169. [384]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs

F. R. BRENNEMAN, U. S. Marshal and JAMES M.
MILLSAP, Deputy U. S. Marshal,
Defendants.

Order Enlarging Time to Settle Bill of Exceptions.

It appearing to the Court that the clerk's office has been unable to complete the transcript of the record of this cause and owing to the press of other business will be unable to complete the same before the date fixed by previous order as the time within which to prepare and settle the bill of exceptions on appeal herein:

Now, therefore, on motion of Lyons & Ritchie, attorneys for defendants, for good cause shown it is ordered that the time for preparing and settling the bill of exceptions in this cause to be used on appeal or writ of error to the circuit court of appeals of the Ninth circuit, is hereby extended to and including the tenth day of October, 1915.

Done in open court at Valdez, Alaska, this 18 day of September, 1915.

FRED M. BROWN,
Judge.

[Endorsements]: Filed in the District Court. Territory of Alaska, Third Division. Sep. 13, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
Entered Court Journal No. 9, page No. 256. [385]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs

F. R. BRENNEMAN, U. S. Marshal and JAMES M.
MILLSAP, Deputy U. S. Marshal,

Defendants.

**Minute Order Extending Time to Settle and Prepare
Bill of Exceptions.**

On motion of Lyons & Ritchie, attorneys for the
defendants, for good cause shown,

IT IS ORDERED that the time for filing and set-
tling bill of exceptions on writ of error herein be
and the same is hereby extended to and including Oc-
tober 15, 1915.

February, 1915, Term—October 8th—114th Court
Day—Friday.

Entered Court Journal No. 9, page No. 332. [386]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Stipulation as to Record.

It is stipulated by the attorneys for plaintiff and defendants, respectively, that the following may be omitted from the record on appeal as made by the court reporter, to wit:

Plaintiff's Exhibit "J"; Defendants' Exhibit 4; the postscript to the letter of Thomas Carstens introduced in evidence as Plaintiff's Exhibit "K"; and that in lieu of the whole of Defendants' Exhibit 1, the following statement be substituted:

It is agreed that Defendants' Exhibit 1, consisting of eleven sheets of bills of goods sold, be abbreviated as follows:

It is admitted that each is on the following bill-head:

"J. A. FAGERBERG. H. M. FAGERBERG.

Nazina, _____

Fagerberg Bros.

General Merchandise

and

Mining Supplies

Nazina, Alaska."

All of said bills are dated in the month of August, 1911.

That they are receipted over signatures as follows:

1. H. M. F.
2. Fagerberg.
3. J. A. F.
4. H. M. Fagerberg.
5. J. A. Fagerberg.
6. Fagerberg.

7. Fagerberg.
8. Fagerberg.
9. Fagerberg. [387]
10. Fagerberg.
11. Fagerberg.

It is agreed that Plaintiff's Exhibit "G" consists of three promissory notes given by Victor Olson payable to J. A. Fagerberg, dated July 8, 1909, for the aggregate sum of \$719.20, due in 120 days, six months and one year respectively, and that this statement be incorporated in the bill of exceptions in lieu of said exhibit.

It is stipulated also that the following be omitted from the record.

The schedule of property in the amended complaint and the judgment.

The reporter's transcript of the colloquy between court and counsel as to the pleadings in the case being taken by the jury to the jury-room.

The instructions asked by plaintiff and the statement of exceptions by counsel for plaintiff to instructions refused and instructions given.

LYONS & RITCHIE,

Attorneys for Defendants and Plaintiffs in Error.

DONOHUE & DIMOND,

Attorneys for Plaintiff and Defendant in Error.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915. Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[388]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Petition for Writ of Error.

Now come the defendants above named and state that on the 21st day of May, 1915, the above-named court entered judgment herein in favor of the above-named plaintiff and against these defendants, in which judgment and in the proceedings had prior thereto in the above-entitled cause, certain errors were committed to the prejudice of these defendants, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore, defendants pray that a writ of error may issue in their behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of and that a transcript of the record and proceedings with all things concerning the same duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendants further pray that an order may be made fixing the amount of a bond for a supersedeas in said cause.

Dated this 15 day of October, 1915.

LYONS & RITCHIE,
Attorneys for Defendants.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915, Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[389]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Assignments of Error.

Now come the defendants and make the following assignments of error in the trial of this cause upon which they will rely in their prosecution of the writ of error herein:

I.

The Court erred in admitting in evidence, over the objection of defendants, Plaintiff's Exhibit "D," which purported to be a contract between Thomas Carstens and J. A. Fagerberg on the one part and H. M. Fagerberg on the other part; it being conceded by plaintiff and by his witness, J. A. Fagerberg, that said contract was signed only by J. A. Fagerberg

and H. M. Fagerberg, the name of Thomas Carstens being appended thereto by J. A. Fagerberg without his knowledge; the same purporting to be a contract for a partnership among said parties and ultimate incorporation.

II.

The Court erred in admitting the testimony of the plaintiff, H. M. Fagerberg, over the objection of defendants, as to speculative profits he might have made in conducting the Blackburn roadhouse and using the attached horses if the attachment had not been made.

The Court erred in admitting testimony of profits lost by reason of the attachment of the roadhouse and horses [390] after evidence had been offered by plaintiff himself designed to show that both the roadhouse and the horses had been leased for about five months prior to the first levy under the writ of attachment complained of and that during all of said time, he had been working for \$100 per month for J. A. Fagerberg under a contract for an indefinite period that was terminated by levy of the attachment.

III.

The Court erred in refusing to give part of instruction No. 5 asked by defendants as follows:

“You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership.

In this case if you find that the Blackburn

roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time, you are entitled to consider the facts regarding possession as making a prima facie case of ownership in J. A. Fagerberg."

IV.

The Court erred in denying defendants' motion for a new trial.

V.

The Court erred in ordering the judgment entered in this cause in favor of plaintiff and against defendants.

Wherefore, the defendants, plaintiffs in error, pray that said judgment may be reversed, vacated and set aside and that the verdict and special findings returned by the jury herein on which said judgment was based, may be set aside and that said action be remanded to the district court for such further proceedings as may, in the premises, seem proper.

LYONS & RITCHIE,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915. Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[391]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

**Order Allowing Writ of Error and Fixing Super-
sedeas Bond.**

On this day came the defendants, F. R. Brenne-
man, United States Marshal, and James M. Millsap,
Deputy United States Marshal, by their attorneys
and filed herein and presented to the court their
petition praying for the allowance of a writ of error,
together with an assignment of errors to be urged by
them, praying also that a transcript of the record
and proceedings in said cause with all things con-
cerning the same, be sent to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, and
further that the amount of bond for supersedeas in
said cause be fixed. On consideration whereof, the
court hereby allows the writ of error as prayed for.

It is further ordered that a bond in the sum of
Five Thousand Dollars (\$5,000), conditioned accord-
ing to law, be executed in behalf of the above-named
defendants with good and sufficient surety, to be ap-
proved by the undersigned judge, and that upon exe-
cution, filing and approval of such bond, said judg-

ment in this cause shall forthwith be superseded and all proceedings in this cause stayed until a final determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 15th day of October, 1915.

FRED M. BROWN,
Judge.

[Endorsed as follows]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. 9, page No. 356. [392]

*In the District Court for the Territory of Alaska,
Third Division.*

#687.

Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Writ of Error.

The President of the United States of America, to
the Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the record and proceedings as also in the rendition of the judgment upon a verdict which

is in the said district court before you between H. M. Fagerberg, plaintiff and defendant in error, and F. R. Brenneman, United States Marshal, and James M. Millsap, Deputy United States Marshal, defendants and plaintiffs in error, as by their assignments of error is made to appear, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in San Francisco in said circuit court on the 14th day of November, 1915, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and the Territory of Alaska should be done. [393]

WITNESS, the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 15th day of October 1915.

[Seal]

ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

Allowed by: FRED M. BROWN,
Presiding Judge of the District Court for the Terri-
tory of Alaska, Third Division.

Entered Court Journal No. 9, page No. 355. [394]

*In the District Court for the Territory of Alaska,
Third Division.*

Filed in the District Court, Territory of Alaska,
Third Division. Oct. 28, 1915. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal for the
Third Division of the Territory of Alaska,
and JAMES M. MILLSAP, Deputy United
States Marshal for the Third Division of the
Territory of Alaska,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, F. R. Brenneman, United States Marshal
for the Third Division of the Territory of Alaska,
and James M. Millsap, Deputy United States Mar-
shal for the Third Division of the Territory of
Alaska, as principals, and the American Surety Com-
pany of New York, as surety, are held and firmly
bound unto H. M. Fagerberg, plaintiff above-named,
in the sum of Five Thousand Dollars (\$5,000.00),
to be paid to the said H. M. Fagerberg, his heirs,
executors, administrators or assigns, to which pay-
ment well and truly to be made we bind ourselves,
our heirs, executors and administrators, jointly and
severally, by these presents.

Sealed with our seals, and dated this 18th day of
October, 1915.

WHEREAS, the above-named defendants, F. R. Brenneman, United States Marshal for the Third Division of the Territory of Alaska, and James M. Millsap, Deputy United States Marshal for the Third Division of the Territory of Alaska, have sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment rendered against them in the above-entitled action by the District Court for the Territory of Alaska, Third Division, which judgment was so rendered and entered by said Court on the 21st day of May, 1915, [395] for the sum of Three Thousand Dollars (\$3,000.00) and costs, and for the return of certain property described in said judgment;

NOW, THEREFORE, the condition of the above obligation is such that if the above-named F. R. Brenneman, United States Marshal for the Third Division of the Territory of Alaska, and James M. Millsap, Deputy United States Marshal for the Third Division of the Territory of Alaska, shall prosecute said Writ to effect, and shall answer all costs and damages, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the principals named herein have hereunto set their hands, and the surety named herein has hereunto set its hand and affixed

its corporate seal, this 18th day of October, A. D. 1915.

United States Marshal for the Third Division of the
Territory of Alaska.

Deputy U. S. Marshal for the Third Division of the
Territory of Alaska,

Principals.

AMERICAN SURETY COMPANY OF NEW
YORK,

By S. H. MELROSE,
Resident Vice-president, Seattle, Washington,
Surety.

[Seal] Attest: H. M. JONES,
Resident Asst. Secretary, Seattle, Washington.

State of Washington,
County of King,—ss.

On this 18th day of October, 1915, before me personally appeared S. H. Melrose and H. M. Jones, to me known to be the resident vice-president and resident asst. secretary of the corporation that executed the within and foregoing instrument, and they acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal, this 18th day of October, 1915.

[Seal]

THOMAS R. LYONS,

Notary Public for the State of Washington, Residing
at Seattle.

[Sixteen Cents Internal Revenue Stamps. Canceled 10/18/15. A. S. Co.] [396]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. 9, page No. 356.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Citation.

United States of America,
Territory of Alaska,—ss.

The President of the United States to H. M. Fagerberg, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the

City of San Francisco, State of California, within thirty days after the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein F. R. Brenneman, United States Marshal, and James M. Millsap, Deputy United States Marshal, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Hon. EDWARD W. WHITE, Chief Justice of the United States, the 15th day of October, 1915.

FRED M. BROWN,
Judge.

Service of copy of this citation admitted this 15 day of October, 1915.

DONOHUE & DIMOND,
Attorneys for Plaintiffs in Error. [397]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,
Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

**Stipulation Specifying Contents of Bill of
Exceptions.**

It is hereby stipulated by counsel for the parties respectively in the above-entitled cause that the following shall constitute the Bill of Exceptions on writ of error to the Circuit Court of Appeals, to wit:

1. Amended Complaint.
2. Amended Answer.
3. Reply.
4. Transcript of Evidence and Instructions of the Court.
5. Exhibits not Incorporated in Reporter's Transcript, or Abbreviated or Omitted by Stipulation.
6. Defendants' Exceptions to Refusal to Give Instructions.
7. Verdict.
8. Special Findings.
9. Motion for New Trial.
10. Order Denying Motion for New Trial.
11. Judgment.
12. Minute Order Allowing Ninety Days from June 22, 1915, to Prepare and Settle Bill of Exceptions.
13. Order Extending to October 10, 1915, the Time for Preparing and Settling Bill of Exceptions.
14. Minute Order Extending to October 15, 1915, the Time for Preparing and Settling Bill of Exceptions.
15. Stipulation as to Record, Abbreviating Exhibits.

16. Petition for Writ of Error.
17. Assignments of Error.
18. Order Allowing Writ of Error.
19. Writ of Error.
20. Bond on Writ of Error.
21. Citation.
22. This Stipulation.
23. Order Allowing, Certifying and Settling Bill of Exceptions.
24. Stipulation as to Supersedeas Bond.

LYONS & RITCHIE,

Attorneys for Defendants and Plaintiffs in Error.

DONOHUE & DIMOND,

Attorneys for Plaintiff and Defendant in Error.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Oct, 15, 1915. Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[398]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

**Order Allowing, Certifying and Settling Bill of
Exceptions.**

It appearing to the Court that counsel for the defendants and plaintiff, respectively, have stipulated and agreed upon a proposed bill of exceptions to be used upon writ of error in this cause, and said proposed bill of exceptions having been delivered to the clerk of this Court, and it further appearing to the Court that said proposed bill of exceptions conforms to the truth and is in proper form.

It is ordered that said bill of exceptions be and the same is hereby approved, allowed and settled and ordered to be filed and made part of the record in this cause.

Done in open court this 15th day of October, 1915.

FRED M. BROWN,

Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 359. [399]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 687.

H. M. FAGERBERG,

Plaintiff,

vs.

F. R. BRENNEMAN, United States Marshal, and
JAMES M. MILLSAP, Deputy United States
Marshal,

Defendants.

Stipulation as to Supersedeas Bond.

It is this day stipulated in open court, by counsel for the parties respectively, and the stipulation is approved by the Court, that the bond on writ of error already furnished by the defendants may remain in the files until the substitution of a bond drawn to meet the objections of the plaintiff herein is presented to the Court for approval.

And it is ordered by the Court that the defendants be given until November 1, 1915, to file such amended bond and that execution of the judgment herein be stayed until that date.

It is further ordered that upon the filing and approval of a new bond as hereinabove stated, the present bond may be withdrawn.

Done in open court, this 16th day of October, 1915.

FRED M. BROWN,

Judge.

Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 9, page No. 361. [400]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto annexed 401 pages, numbered from 1 to 401, inclusive, are a full, true and correct

transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the stipulation of counsel for the parties, respectively.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$24.30, was paid to me by Messrs. Lyons & Ritchie, attorneys for the defendants, and plaintiffs in error herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court at Valdez, Alaska, this 15th day of October, A. D. 1915.

ARTHUR LANG,

Clerk of the District Court for the Territory of
Alaska, Third Division.

By K. L. Monahan,

Deputy. [401]

[Endorsed]: No. 2679. United States Circuit Court of Appeals for the Ninth Circuit. F. R. Brenneman, United States Marshal, and James M. Millsap, Deputy United States Marshal, Plaintiffs in Error, vs. H. M. Fagerberg, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed November 9, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2679

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

F. R. BRENNEMAN, U. S. Marshal,
and

JAMES M. MILLSAP, Deputy U. S. Marshal,
Plaintiffs in Error.

vs.

H. M. FAGERBERG,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT,
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

BRIEF OF PLAINTIFFS IN ERROR

C. F. WILT and
LYONS & RITCHIE,
Attorneys for Plaintiffs in Error.

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

F. R. BRENNEMAN, U. S. Marshal,

and

JAMES M. MILLSAP, Deputy U. S. Marshal,
Plaintiffs in Error.

vs.

H. M. FAGERBERG,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT,
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

In this brief defendant in error will be referred to as plaintiff, and plaintiffs in error as defendants, as in the court below.

This action was instituted to recover damages for an alleged wrongful attachment levied by the United States marshal through one of his deputies, his co-defendant herein, upon certain property which was claimed to be the property of one J. A. Fagerberg, a brother of plaintiff and defendant in error herein.

After the levy was made demand was made by

plaintiff H. M. Fagerberg upon the deputy marshal for return to him of part of the property levied upon and which is the subject matter of this action. The marshal refused the demand and held the property. Thereafter this action was brought by H. M. Fagerberg as stated. The case was tried before a jury and a verdict was returned in favor of the plaintiff, upon which judgment was rendered by the trial court, and defendants sued out this writ of error.

The facts in regard to the disputed property as claimed by defendants, and not contested except as to the issue of partnership, are as follows:

In the summer of 1907, Thomas Carstens of Seattle, president and principal owner of the Carstens Packing Company, was the owner or chief owner of a stock of merchandise situated in the Chititu mining district of Alaska, about 200 miles from the southern coast. The business had not been managed in a satisfactory way and the man who had been in charge was leaving Alaska. Carstens made a proposition to J. A. Fagerberg, with whom he had had some dealings, to take charge of the store. Fagerberg agreed to do so, but stated that he could not put in all his time at it and proposed to employ his brother, H. M. Fagerberg, plaintiff herein, to run the store. This was agreed to and it was agreed that H. M. Fagerberg should receive a salary of \$1,500 per year for his services. H. M. Fagerberg remained in charge of the store until the fall of 1910, when he gave it up. Thereafter the store was at times closed and at other times different persons had charge of it.

H. M. Fagerberg testified that during the three years he managed the store he received none of his compensation except very small amounts from time to time for necessary personal expenses and that when he left the store more than \$4,000 was due him. At that time, according to his testimony, he had in his possession \$3,800, which he proposed to apply on his account. Both he and J. A. Fagerberg testified that J. A. Fagerberg persuaded him instead to loan the money to the latter, who was about to build a roadhouse at Blackburn, Alaska, not far from Chititu, which roadhouse thereafter became a part of the subject matter of this action. Both brothers testified that H. M. Fagerberg did loan \$3,800 to J. A. Fagerberg, without any writing to evidence the same, without any agreement for interest, or any time fixed for payment, and that the amount had never been paid nor any part of it. They further testified that H. M. Fagerberg continued to work at \$125 per month without any interest in the business, and later for \$100 per month.

H. M. Fagerberg testified that he then believed he was still working for Thomas Carstens and J. A. Fagerberg; that he never received any information to the contrary. He testified that he worked all through the fall and winter of 1910 and 1911 in building the roadhouse and had charge of the work, and that he conducted the roadhouse part of the time after it was built, doing all this under his agreement of 1907 to work for Thomas Carstens and J. A. Fagerberg for \$125 per month. Both he and J. A. Fagerberg explic-

itly denied that any partnership existed between them at any time between the year 1907 and the trial of the action. They both testified that H. M. Fagerberg had no interest in any business of J. A. Fagerberg except the wages it was agreed he was to receive and that he never in the seven years from 1907 to 1914 drew any of his wages except small amounts for necessary personal expenses. Both Fagerbergs testified that in the spring of 1912 H. M. Fagerberg agreed to accept a reduction of his wages from \$125 to \$100 per month and that he thereafter worked for the latter amount.

In 1912 the wife of J. A. Fagerberg sued him in the district court of Alaska for separate maintenance and obtained a decree ordering him to pay her \$50 per month. In the summer of 1913, J. A. Fagerberg, then in Seattle, was threatened with legal process of various sorts, including arrest, to compel him to pay the amount due his wife for separate maintenance. In July, 1913, he made a bill of sale of everything he owned in Alaska, including the Chititu store, transferring and conveying everything to H. M. Fagerberg. Testimony was conflicting as to the reasons for this transfer. The Fagerbergs testified that it was made to secure H. M. Fagerberg for about \$5,000 due him for wages. Officers of the Carstens Packing Company testified that it was done to cover up all property in J. A. Fagerberg's name and put it beyond the reach of his wife's demand for separate maintenance.

During all the time from 1910 to 1914, the Fager-

bergs were closely associated in business, and it was admitted by them that they were commonly reputed to be partners in the district where they were operating. It was admitted that each of them seemed to be interested in all the business which the other transacted and in all property which the other controlled. They worked together or alternately in conducting the roadhouse, in logging contracts, in freighting and in carrying mail under a government contract.

In the early part of 1914, J. A. Fagerberg was in Seattle and engaged in some negotiations with Thomas Carstens to obtain money and goods for a mercantile venture in the Shushanna mining district of Alaska, a newly discovered camp which in public opinion had a great future. The testimony was conflicting as to who was most interested in these negotiations. Fagerberg testified that Thomas Carstens and others associated with him were very anxious to give him an outfit for the Shushanna to recoup at least a part of the heavy loss in the Chititu store. Carstens and other officers of the Carstens Packing Company testified that Fagerberg tried hard to obtain from Carstens a large amount of money and goods, but Carstens turned him down. Fagerberg, however, bought a large shipment of oats on Puget Sound and had them shipped to Alaska C. O. D. He then drew a sight draft on Thomas Carstens for the freight, which was paid. Carstens testified that he had no prior agreement to pay it and that on the contrary he had expressly told Fagerberg he would not furnish him any more money but would, if he wished it, supply

him with a small amount of meat; that when the sight draft arrived, after reflection, he decided to pay it because he had always had a liking for Fagerberg and it occurred to him, as he put it, that Fagerberg had a chance to get on his feet and that he would take one more chance with him and help him. After that he sent a large stock of merchandise of the value of more than \$4,000 to Fagerberg upon agreement by correspondence that Fagerberg was to remit to him the proceeds as fast as the goods were sold. This Fagerberg failed to do. Carstens sent an agent to Alaska who reported that Fagerberg was converting everything to his own use and Carstens thereupon instituted an action to recover the amount of the goods and sight draft from Fagerberg, and attached everything he had, including the property claimed by H. M. Fagerberg.

When J. A. Fagerberg returned to Alaska about March 1, 1914, he told H. M. Fagerberg that a corporation was to be organized composed of themselves and Thomas Carstens, which was to take over all the property then standing in H. M. Fagerberg's name. At the same time he made a memorandum agreement with H. M. Fagerberg by which the latter was to transfer everything to this corporation and go into its employ as a packer at \$100 per month, and until the corporation was formed he was to work for J. A. Fagerberg and Carstens at that salary; meanwhile leasing to them at figures aggregating \$825 per month the property which he proposed to sell. Thereafter he worked as a packer until the attachment was levied

early in the following August. According to the testimony of the Fagerbergs, after the levy J. A. Fagerberg turned everything over to H. M. Fagerberg and said he would quit. This was considered by them a delivery of all the property in use by either of them to J. A. Fagerberg.

It was admitted that no profit was made between March and August by any enterprise in which the Fagerbergs were engaged—roadhouse, stores and freighting business were paying out more money than they took in. It was claimed, however, that the paying business would have been later. J. A. Fagerberg testified “August and September are big months.” It was in evidence that in September J. A. Fagerberg was put into bankruptcy on petition of his brother, H. M. Fagerberg, and that the schedules in bankruptcy showed wages due several employes for several months back, besides large sums for merchandise.

ASSIGNMENTS OF ERROR.

I.

The court erred in admitting in evidence, over the objection of defendants, plaintiff’s exhibit “D,” which purported to be a contract between Thomas Carstens and J. A. Fagerberg on the one part and H. M. Fagerberg on the other part; it being conceded by plaintiff and by his witness, J. A. Fagerberg, that said contract was signed only by J. A. Fagerberg, and H. M. Fagerberg, the name of Thomas Carstens being appended thereto by J. A. Fagerberg without his knowledge; the same purporting to be a contract

for a partnership among said parties and ultimate incorporation.

II.

The court erred in admitting the testimony of the plaintiff, H. M. Fagerberg, over the objection of defendants, as to speculative profits he might have made in conducting the Blackburn roadhouse and using the attached horses if the attachment had not been made.

The court erred in admitting testimony of profits lost by reason of the attachment of the roadhouse and horses after evidence had been offered by plaintiff himself designed to show that both the roadhouse and the horses had been leased for about five months prior to the first levy under the writ of attachment complained of and that during all of said time, he had been working for \$100 per month for J. A. Fagerberg under a contract for an indefinite period that was terminated by levy of the attachment.

III.

The court erred in refusing to give part of instruction No. 5 asked by defendants as follows:

“You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership.

In this case if you find that the Blackburn roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time,

you are entitled to consider the facts regarding possession as making a *prima facie* case of ownership in J. A. Fagerberg.”

IV.

The court erred in denying defendants’ motion for a new trial.

V.

The court erred in ordering the judgment entered in this cause in favor of plaintiff and against defendants.

ARGUMENT.

In argument all the assignments of error may be considered together, because it is the verdict that defendants complain of, on the ground that it was wholly unjustified by the evidence and appeared to have been given under the influence of passion or prejudice. This objection to the verdict is set up in the motion for a new trial, denial of which is assigned as error (Assignment IV).

As already shown in the statement of the case the vital issue in the trial was the question whether or not a partnership existed between the two Fagerbergs. All other issues revolve around this. If the Fagerbergs were partners, they were joint owners of the property involved, jointly and severally liable for all firm indebtedness and either could be sued on account of such indebtedness, and any property belonging to either or to the firm could be taken on attachment or execution. Counsel for defendants are mind-

ful of the rule that appellate courts are reluctant to reverse a trial court on a question of fact. Nevertheless they will do so when the judgment is so clearly against the weight of evidence that to allow it to stand would be palpable injustice. The rule is thus stated in *Darlington vs. Turner*, 202 U. S. 195-220:

“Where both courts below have found a particular state of facts we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence.”

In that case the supreme court reversed the court of appeals of the district court of Columbia, which had affirmed the supreme court of the district in upholding the findings of an auditor to whom the case had been referred.

Defendants contend in the case at bar that not only did the preponderance of evidence point irresistibly to the conclusion that the two Fagerbergs had been in partnership for several years and were joint owners of the property, but their own admissions and their names appended to numerous documents signed “Fagerberg Brothers” raised a quasi estoppel against them to deny that they were partners. Further, their contradictory testimony and weird explanations should have raised an almost conclusive presumption against their veracity. Some of their assertions of fact would stagger not only credulity but gullibility. On many matters they were flatly contradicted, leaving no escape from the conclusion that either they or the contradicting witnesses were guilty of wilful perjury. These contradictions will be given

hereafter in this brief in order that this court may decide which witnesses committed perjury.

H. M. Fagerberg, the plaintiff, testified that he took charge of the Nizina store August 1, 1907, at a salary of \$1,500 a year (R. 18-20-63); that he left the store late in the fall of 1910 (R. 66); that at that time he had been paid only about \$500 or \$600 of his salary (R. 20); that about \$4,500 was due him (R.70); that he then had in his possession \$3,800; that he intended to keep that and quit his job, but J. A. Fagerberg talked him into leaving the money in the latter's hands to be used in business, and to continue working at a wage of \$125 a month at anything J. A. Fagerberg wanted him to do. The following from the record, page 24, is illuminating:

“A. I asked him—I had the money; I had practically \$3,800 in my possession then, and I told him I wanted my money. ‘Well,’ he says, ‘after I put you in here and give you a chance to make this money, you are going to pull it out and give me and Carstens no chance at all, when there is a chance to make some money.’

Q. And the upshot of it was, you turned the money over to him and didn't hold it out?

A. I didn't hold the money out of him,—I stayed with him.”

The plaintiff also testified on cross-examination that he considered that he was working for J. A. Fagerberg and Thomas Carstens for wages all the time from 1907 until his brother gave him a bill of sale for all the property held by either Fagerberg in July, 1913; that in all that time he never drew any money except for expenses; that he never saw Thomas Cars-

tens nor had any communication with him although he once visited Seattle. The following luminous statements from pages 70-1-2-3-4 of the record illustrate the free tenor of plaintiff's conversation on the witness stand. It will be noted that he was uncertain whether it was \$4,000 or \$4,500 that was due him in the fall of 1910:

“Q. At the time you quit the store, or practically quit it, in the fall of 1910, how much was due you for back salary—at the time you say you quit the roadhouse and went into the logging camp—how much was due you for back salary at \$1,500 per year?

A. Well, there was practically \$4,500.

Q. When you left that work at the Chititu store, when you quit spending all your time at the Chititu store, which was about August or September, 1910—how much was due then for wages or salary?

A. Probably \$4,000.

Q. Then you had received practically nothing during those three years?

A. No, practically nothing.

Q. You had been working for your board, as far as receiving anything was concerned?

A. That's the fact, yes.

Q. You had about \$4,000 coming?

A. Yes, sir.

Q. Now, you were working for Al when you worked in the logging-camp and built the roadhouse at Blackburn?

A. Yes, sir.

Q. You had no interest in that?

A. No, sir.

Q. And when you accepted a reduction in salary to \$100 per month in the spring of 1912, you were still working for Al?

A. Yes, sir.

Q. When you were working at the Chititu

store from 1907 to 1910, your understanding was that you were working for J. A. Fagerberg and Thomas Carstens?

A. Practically, as I understood the conditions between Al and Thomas Carstens?

Q. And for whom were you working when you quit the Chititu store and went out to the logging camp—were you still working for Thomas Carstens?

A. Practically, under the same agreement in force.

Q. And during all of 1911 then, when you were working on the construction of the Blackburn roadhouse and in the fall of that year, including 1912 when you freighted on the trail, you considered that you were still working for Thomas Carstens?

A. I certainly did.

Q. You understood that there was a sort of general partnership between J. A. Fagerberg and Thomas Carstens in the business that J. A. Fagerberg was doing in the Nizina country?

A. Something to that effect, yes, sir. The way I understood it, at the time the Carstens Packing Company held a bill against the old Nizina Trading Company and at the instigation of the Carstens Packing Company this was turned over to Al—that is my understanding of it; that was the way it was explained to me.

Q. And you were still working for J. A. Fagerberg and Thomas Carstens, or the Carstens Packing Company, as the case may be?

A. As the case may be, yes, sir; I don't know how the situation stood exactly; that is the way it was explained to me at the time.

Q. At what time? Until what time?

A. Until 1913.

Q. Until you got this bill of sale?

A. Yes, sir.

Q. The latter part of the summer of 1913?

A. Yes, sir.

Q. And your understanding was that you were working for Thomas Carstens in the freighting?

A. Yes, sir.

Q. And in the roadhouse?

A. Yes, sir.

Q. And in the construction of the roadhouse?

A. Yes, sir.

Q. Did you see Mr. Carstens when you were in Seattle in 1909.

A. I did not, no, sir.

Q. Did you hunt him up?

A. No, sir, I did not.

Q. Did you have any correspondence with Mr. Carstens or the Carstens Packing Company about your work up there?

A. I never did.

Q. At the time you quit working at the Chititu store and when getting out logs for the Blackburn roadhouse, your idea was that Mr. Carstens was to be interested in the Blackburn roadhouse?

A. The same principle would apply there; in fact I demanded my money in 1910, before I went over there, and as I explained before, I agreed to stay by the proposition with them—my wages were still in the business.

Q. At that time you had about \$3,800 in your possession?

A. I had that, yes, sir.

Q. Which you could have held out under your contract?

A. Which I could have held out under my contract and stuck it into my pocket.

Q. And instead of that, in order to help along the business you staid right with it, and allowed Al Fagerberg to use it?

A. Yes, sir.

Q. And you never went to see Mr. Carstens or said anything to him about it?

A. I never did.

Q. You got uneasy about your money?

A. I got uneasy about my money, yes.

Q. Did it ever occur to you to write Mr. Carstens to ask him how far he was backing Al in the business he was doing?

A. It never occurred to me, never thought of it.

Q. At the request of Al, you left the \$3,800, which was in your possession and which you could have retained, if it was due and owing to you, you left it at his request and went working for him and did work for him for nearly a year in the construction of the roadhouse and still had \$4,000 due you—didn't you consider it worth while to ask Mr. Carstens, write him and ask him if he was interested in the roadhouse?

A. It didn't strike me that way, no, sir.

Q. You have stated there was \$4,000 due you?

A. Al was handling that and they could talk that over themselves; I might have gone further with Al than I would with anyone else, naturally would.

Q. But you became quite dissatisfied, according to your own statement, in the spring of 1912—so much so that you and your brother had a serious disagreement?

A. Yes, sir.

Q. But you continued to work for Fagerberg and Carstens for more than a year after that without writing to Mr. Carstens and asking him whether he was back of it?

A. Why, no, of course I didn't; it never entered my mind. I understood the proposition and Al was handling that end of it for him. They never took the trouble to consider me; I was dealing with Al and he was representing them.

Q. When did you quit working for Al Fagerberg and Thomas Carstens?

A. When the deed was delivered over to me."

Plaintiff continued to work for wages, according to his statement, until July, 1913, drawing only enough money for expenses and at that time had \$5,600 due him, as stated on cross-examination (R. 76), or \$5,300, as he stated on direct examination (R. 32). The following from the latter page is cited to show plaintiff's careless manipulation of figures. He was testifying concerning the bill of sale, which stated \$4,500 as its consideration;

“Q. Did you have more money than that coming at that time from J. A. Fagerberg, July 15, 1913?

A. Yes, I think I did.

Q. How much more?

A. It was practically about \$500 more than that,—practically \$800.

Q. \$800 more than is stipulated there—then that would be \$5,300?

A. \$5,300 that I had coming.”

On the matter of plaintiff giving back the \$3,800 which was less than the amount due him for wages in 1910, to be used for the sole use and behoof of J. A. Fagerberg and Thomas Carstens, the court will please note the testimony of J. A. Fagerberg (R. 192-3-4-5), showing that no evidence in writing was given of the loan, it was to draw no interest, was unsecured, and had no fixed time of payment:

“Q. Did you have any talk to him about this \$3,800 that he had in his possession or under his control?

A. Yes, in the fall of 1910.

Q. Was that before he started in on the logging?

A. He had already started; he had the logs practically out and he had the barn up.

Q. And who was paying the wages of the men at that time?

A. I paid them afterwards, after I came in.

Q. At that time they hadn't been paid?

A. At that time they hadn't been paid; he got the supplies from Blum to supply the men, their clothing.

Q. State your version of the conversation between yourself and Harry over this \$3,800?

A. We got into an argument over it and what started it, somebody issued a check on the Valdez bank, issued a forged check on Harry, and Mr. Lang said to me, 'Harry has overdrawn his account,' and I said, 'I don't see any reason for it,' but I said, 'All right, charge it up to me, to my account,' and when I went in there—I had been working hard all summer, and had been out on the trail and around and I was cold and cranky, and I jumped on him rough-shod for overdrawing his account, and one thing led to another and I asked him what he had done with the money. 'Was it necessary to overdraw your account and I have to make it good for you,' and he said, 'I have \$3,800 for my salary,' and an argument came up about the place at Kenecott; 'Well,' he says, 'I am holding that out for my salary, and I intend to hold it, too,' and the argument went on until we landed into a scrap; I was stronger; I didn't want to abuse the boy and I held him until he cooled down a bit and told him where he was at and talked him out of it.

Q. Where was the \$3,800 at this time?

A. He had the money in the Scandinavian-American Bank, I think, outside.

Q. He turned that over to you?

A. Yes, he gave me a check for it on the Scandinavian-American Bank.

Q. So you are sure it was the Scandinavian-American?

A. Yes, sir.

Q. Did you concede at that time that the \$3,800 was due him?

A. Yes, sir, I conceded that the \$3,800 was due him, I concluded the \$3,800 was due the boy and I think a little more.

Q. How did you persuade him to give it up to you?

A. I said to him, 'I put you in here and I am up against it on the proposition,' but I told him the advantages of the thing and the points of the argument, and I said, 'The property is worth it; any time I fall down you have the house here, when I put in the house—you can't lose any way, even if the Carstens Packing Company gives you the dirty end of it.'

Q. You literally talked him out of it?

A. I literally talked him out of it.

Q. By smooth talk?

A. You bet you, I admit that.

Q. What inducement did you offer him to give up that \$3,800—anything but the desire to help you?

A. No, nothing else but the brotherly feeling there was in that respect. I never offered him any inducements; I told him the prospects of the country and the advantages of the country.

Q. He wasn't to be in on the rake-off?

A. No, sir.

Q. Absolutely had no interest in the Blackburn place?

A. No, he had no interest whatever.

Q. Not even an optional interest?

A. Not even an optional interest; no, he was simply on a salary and that was the cause of the fight, and the fight between myself and wife was over that old stock and I was standing up for the Carstens Packing Company.

Q. At that time, in the fall of 1910, he was working for you at \$125 and he loaned you this \$3,800 without interest simply to help you out?

A. That was my understanding with Harry when I put him in there. I thought \$1,500 was good wages and he could let it stay in the business.

Q. Did you still owe him the money in 1912?

A. Yes, sir.

Q. And was that evidenced by a note or anything?

A. He had this contract that Mr. Brock drew up for him.

Q. He never had anything in writing until Mr. Brock drew that up in the spring of 1912?

A. No, sir.

Q. Was it a part of the consideration in the agreement that his wages were cut to \$100 per month?

A. I don't know.

Q. He let you have this \$3,800 indefinitely without any interest or without anything in writing until the memorandum agreement was drawn up by Mr. Brock in the spring of 1912?

A. Yes, sir.

Q. And he continued under the old arrangement, except that his salary was cut to \$100, until the summer of 1913?

A. Yes, sir."

The court will observe that plaintiff "wasn't to be in on the rake-off," and had no interest, "not even an optional interest" in anything but his wages, and such was his child-like fidelity and devotion that he continued to work on that visionary basis for three years more and still received no wages except enough for personal expenses. This interesting story seems to have placed no strain upon the credulity of the jury, though it appears to counsel for defendants that its vast improbability should record an instant and deep impression upon an average mentality. Returning to the extemporaneous remarks of plaintiff he gives the following account of proceedings after he handed back the \$3,800 to his brother to be used with-

out security or increment in the speculative business of J. A. Fagerberg and Thomas Carstens, a business which seems to have germinated and fructified nothing but debt for all concerned. Hear him (R. 66-7):

“Q. In the fall of 1910, you went at something else?

A. Yes, sir.

Q. You went to logging, I believe, you said?

A. I did, yes, sir.

Q. That was for the purpose of getting out logs to build the Blackburn roadhouse, I understand?

A. Yes, sir; and another thing, we got out logs.

Q. Who do you mean by we?

A. My brother and myself; I naturally say we since I was connected with the business and working there, Sam Rogers and myself; that is the way I put it; he was the man working with me, cutting these saw logs. We cut practically 80,000 feet of saw logs and hauled them to the mine, hauled them in the winter and they were out on shares by the Kennecott Mines Company, and half of them, half the lumber—it was divided.

Q. Divided between whom?

A. The Kennecott Mines Company and my brother and myself.

Q. The purpose of that logging was to obtain lumber for the—

A. For the construction of the roadhouse.

Q. Did you go back at any time to run the Nizina store?

A. No, sir; not after the spring of 1911.

Q. You never were in active charge of the store for any length of time after you quit in the early fall of 1910?

A. No, sir; not while it was in operation.

Q. You stated that you worked around at different things during 1911—a good part of the

time you were working on building the Blackburn road house?

A. Yes, sir.

Q. And what time was that finished?

A. It was finished along in the fall; we started to build, the actual construction of the building, in the spring of 1911 and the barn and outbuildings, and it was finished in the fall, towards the fall."

The court will observe that the plaintiff's nimble tongue in this chapter tells what "we" did. Also that "we" got out lumber to build the roadhouse at Blackburn, which plaintiff says he had no interest in although half the lumber belonged to "my brother and myself." Plaintiff thought he was working for his brother and Carstens for wages for six years, of which he received very little, and yet when questioned about a newspaper advertisement reading "Fagerberg Brothers," which he said he did not put in the paper himself, he explained (R. 81):

"The way that was, when I went into Chittu, the name of Carstens and Myers, they couldn't do business in there because their name was so damned rotten, and I was running the store there, between me and my brother—I was running it there and it naturally drifted into Fagerberg Brothers. We had a pretty fair reputation and were doing things on the square."

When his attention was directed to the fact that he had worked a long time for Carstens notwithstanding the latter's "rotten" name, he explained (R. 43-4):

"Q. You say the Carstens Packing Company had a bad reputation in there?

A. They certainly did.

Q. Didn't you take a long risk to work for Thomas Carstens for six years, if he had a bad reputation, without writing to him and asking him when he was going to pay you?

A. Perhaps I did, but at the time I went in there, I didn't know the people I was dealing with as I do now.

Q. You say they had a bad reputation at that time?

A. I was taking other people's word for that, I hadn't found it out; I have to be shown first and when I am shown, I know it."

On page 96 of the record plaintiff admits:

"Q. You worked for Al Fagerberg and the Carstens Packing Company, Thomas Carstens, for nearly six years, until they owed you a balance of nearly five thousand dollars, and you never wrote to Thomas Carstens and asked him for the money?

A. No, sir; I never did."

This queer testimony, like numerous other fragments, demonstrates that plaintiff's memory and ideas are highly adjustable.

Documentary admissions of partnership were numerous. Plaintiff admitted that an advertisement of Fagerberg Brothers' store ran in a Valdez paper two or three years (R. 80). Also that he used billheads reading "Fagerberg Brothers," and signed numerous bills made out on them "Fagerberg Brothers," by himself, using either his full name or initials (R. 83-4). A stipulation as to the record (R. 437) lists ten of these bills and shows the form of billhead. Another is shown on page 369 of the record. On page 87 of the record appears a letter to Schwabacher Bros., Seattle, enclosing check for \$109 on account,

signed "Fagerberg Bros., Pr. H. M. Fagerberg," which plaintiff admitted he signed. He gave this naive explanation (R. 88):

"I sent it that way as I explained before, the business has been conducted as Fagerberg Brothers to protect the Carstens Packing Company, and used as a firm name in that respect only."

This stock explanation of plaintiff's yearning to hold the Carstens' name invisible flashes up at intervals in his testimony like a blinker light. It was his dernier resort when no other excuse for the partnership name seemed available.

Plaintiff received a check in July, 1912, drawn in favor of Fagerberg Bros. and indorsed it "Fagerberg Bros. Per H. M. Fagerberg, member of firm" (R. 89). He admitted that when the Blackburn roadhouse was taken back from Breedman & Church in 1914, a stock of goods was taken with it and paid for in notes signed by himself and J. A. Fagerberg (R. 92). He admitted that when Malcolm Brock of Blum & Co., effected a settlement between him and his brother in the spring of 1912 a mortgage was given to Blum & Co. for about \$2,600 and signed by the two Fagerbergs. As usual plaintiff had an explanation. Here it is (R. 384):

"Q. State the circumstances under which you signed that mortgage?

A. Mr. Brock insisted on my signing it—he said my name had been used in the business and he held me as responsible as he would Al—he looked at it that way and I signed it."

Brock was manager of the bank and mercantile

house of S. Blum & Co., at Cordova, with which the Fagerbergs had done business for several years, and to an extent that led to an indebtedness of \$2,600. He evidently knew the relations existing between the two Fagerbergs. It might be mentioned here that plaintiff made much in his testimony of this agreement between himself and brother, drawn by Mr. Brock as a settlement between the two Fagerbergs. He insisted that it showed that he was only working for wages, but this extremely valuable agreement, which called for the payment to him of \$4,000 by his brother, was unhappily lost before the trial. Plaintiff said he had looked for it but could not find it (R. 26-166-7). The two Fagerbergs testified to its contents but Mr. Brock was not subpoenaed although he would have been a disinterested witness.

Plaintiff's Exhibit C (R. 34), the lease of the Blackburn roadhouse from J. A. Fagerberg to S. O. Breedman, dated November 16, 1912, describes "The Blackburn roadhouse heretofore operated as a roadhouse by Fagerberg Brothers" (R. 34). Defendants' Exhibit 5 (R. 223) was an order for goods dated April 7, 1915, which J. A. Fagerberg admitted was in his handwriting and that he sent it out (R. 222). It was signed Fagerberg Bros.

J. A. Fagerberg admitted that he authorized an advertisement of the Nizina store to be put in the *Valdez Prospector*, but said the newspaper man wrote the ad. He admitted also that he saw the ad from time to time (R. 224-5). He gave the same explanation of the billheads reading "Fagerberg

Brothers'' (R. 225-6). He invited the court and jury to believe that a Seattle printer printed billheads under that firm name without an order to do so. Here is the statement:

''A. In 1910 Harry said he had run out of the old Nizina billheads, and he said, 'Better send for some billheads,' and I had some billheads printed; and the way that came out Fagerberg Brothers, I met Johnson in Seattle and a man connected with the stationery company and told them to get me out several thousand billheads, blank form; I picked out the form and there was nothing said about the heading and they knew me from schooldays and knew Harry was with me and they just put it in Fagerberg Brothers.

Q. You didn't tell him to put it in Fagerberg Brothers, General Merchandise, Nizina, Alaska?

A. He asked me what I was doing up there and I said, 'This is for a general merchandise store, miners' supplies.' ''

Concerning the Blackburn roadhouse J. A. Fagerberg conceded (R. 165):

''Q. You got that house constructed in the fall of 1911?

A. Yes, sir.

Q. Did you open it up for the accommodation of guests?

A. Yes, sir.

Q. Did you run it yourself on the start?

A. Not on the start I did not.

Q. Who did run it?

A. Harry was in charge of the house at the start and during construction.''

Finally on the issue of partnership the court's attention is directed to the following admissions of the plaintiff (R. 140):

“Q. You stand then on your proposition, that at no time were you a partner of Al Fagerberg?

A. I certainly do.

Q. That you worked for him six years, for him and some more or less visionary partner of his in Seattle, whom you never saw and never corresponded with?

A. Yes, sir.

Q. You never got any money out of either of them, but your board; he owed you \$3,800 which you gave back and you never had any business interest in the possible profits of this vast ramification of business that Al was trying to transact?

A. Not a bit; at that time I was aware of the Carstens Packing Company in 1910—and my brother will admit then I did not want to have nothing at all to do with the Carstens Packing Company only on a wage proposition and I wouldn't go into business with them at all under any consideration; if I knew they were in a concern I would get out, believe me, before they got a chance to hook me.

Q. That was your attitude toward them in 1910?

A. That was my attitude toward them in 1910.

Q. But you worked for them three years afterwards without wages?

A. Yes, I did, out of consideration for my brother—that was the facts of it.”

And particularly the following (R. 15:2-4):

“Q. At the time this attachment was made and for a year or two beforehand, is it not true that around McCarthy and Blackburn, in that country, you were universally known as Fagerberg Brothers?

A. To a certain extent, yes.

Q. And is it not a fact that your neighbors up there dealt with you as Fagerberg Brothers?

A. To a certain extent, yes; a good many of them, however, were aware of the fact how it stood, some of them.

Q. Wasn't it generally understood that Fagerberg Brothers owned the freighting business and roadhouse and were running it together?

A. Yes, that is the way it was understood."

Comment on this last admission seems superfluous when it is remembered how many acts of the Fagerbergs already cited from the testimony built up the popular belief that they were partners.

In view of the remarkable statements made by the Fagerbergs to explain away the presumption of partnership raised by their course of conduct in business this seems like a fitting place to bring up the question of veracity. Counsel for defendants insist that the claim of the Fagerbergs that they were never partners and that H. M. Fagerberg was working for J. A. and Carstens for wages for six years without drawing any more of his pay than he required for the modest personal expense entailed by living on the frontier is a tale so marvelous that unless it were upheld by corroborative evidence sufficient to outweigh its improbability the veracity of the witnesses relating it falls under grave suspicion. No such corroboration appears in the record. All the direct testimony except their own and virtually all the circumstantial evidence contradicts the queer contention of the Fagerbergs. As affecting the veracity of the witnesses the following contradictions and incongruities in the testimony are cited:

When J. A. Fagerberg returned to Alaska about

March 1, 1914, he made an agreement with plaintiff for an incorporation which was to take over all property owned by plaintiff (R. 40). The stockholders were to be the two Fagerbergs and Thomas Carstens. Carstens was to put in \$10,000 worth of merchandise and receive \$20,000 of the capital stock; J. A. Fagerberg was to get \$10,000 of the stock, for what consideration does not clearly appear. H. M. Fagerberg was to get \$7,000 for all the property he carried in his name. The total capitalization was to be \$50,000. H. M. Fagerberg fixes the value of his property at that time at \$10,000 above indebtedness (R. 117). So the corporation was compounded of the following ingredients:—Plaintiff and Thomas Carstens were to put in \$20,000 in merchandise and other property, and the remaining \$30,000 of capitalization was to be water or hot air, issued for talent in organization or some equally volatile substance. Plaintiff was to receive 14 per cent of the total stock which was to represent \$20,000 in actual value. The actual value of his stock then would have been \$2,800 until augmented by phenomenal profits, which seem never to have been made out of the Fagerberg enterprises at any time between 1907 and 1914, and were finally achieved only through a jury verdict in 1915.

Just why plaintiff was willing to exchange visible property worth \$10,000 for corporate stock worth \$2,800 on the basis of its real assets seems difficult to explain from the standpoint of sound finance, but plaintiff rose to the occasion by calling attention to the provision in the agreement that J. A. Fagerberg

was obligated to purchase plaintiff's \$7,000 worth of stock at par before September 1, 1914 (R. 41-2). He said he was willing to take that much and get out of the country (R. 117). The latter statement followed his assertion that he was really to receive \$825 a month rental for the various properties he was to transfer to the incorporation in case the corporation scheme failed to crystallize. This contribution to history by the guileless plaintiff in the case seems worthy to be embalmed in the argument, since it exhibits the mental processes of the young man who worked for his brother seven years for his board, and then, knowing his brother to be insolvent with judgments hanging over him, was willing to turn over to that speculative person \$10,000 worth of property in consideration of a memorandum agreement that the said brother was to pay him \$7,000 cash in less than six months. Here is plaintiff's testimony found on pages 115-6-7-8 of the record:

“Q. What property was to go into this incorporation besides the \$9,000 worth of personal property you put in and the few thousand dollars Carstens was to put in?

A. There was the Nizina roadhouse and store and practically everything I had in the country—that is practically what it amounted to when it came to a showdown. I intended to clean up with this agreement in the fall—I was to get my \$7,000 clean out of the business and I was to have nothing left in the country; that included some claims I had in the Shushanna, my interest in the mill, the Borger-Struck Mill Company, etc.

Q. What was that worth?

A. That was practically borrowed money I

had and that was to be cleared up.

Q. What was the value of your mining property and the mill property, approximately?

A. The mill had about 150,000 feet of logs on hand. They cost about, in the water, \$11 per thousand landed in the water.

Q. That would be then something over sixteen or seventeen hundred dollars?

A. Yes, and the value of the mill at that time, over \$2,000.

Q. Somewhere from \$3,500 to \$4,000 in the mill and logs and lumber in the mill?

A. Yes, sir.

Q. And your Shushanna claims were wholly of speculative value?

A. Yes, my Shushanna claims were of speculative value.

Q. You considered they had some value—they were fair prospects?

A. Yes, sir.

Q. Then you had something like \$13,000 worth of property?

A. Practically—you might put it that way, yes.

Q. And Carstens was to be allowed \$10,000 for his old loan in the Nizina store?

A. Yes, sir.

Q. And \$10,000 for new property he was to put in—was he to put in the full \$10,000?

A. That was my understanding of it—that he was to put up \$10,000 cash.

Q. What was Al to put in for his \$10,000?

A. I don't know—I left that to him, that was his own business and I didn't consider it, as long as the prospect suited me.

Q. The company was to be organized for \$37,000, and you were to put in \$13,000 of property and get \$7,000 out of it?

A. Yes, sir.

Q. Mr. Carstens was to put in ten and get twenty?

A. Yes.

Q. And Al was to put in his talent and get ten?

A. Yes, sir. When I put in this \$13,000 you want to know that there was some liabilities against this thing.

Q. How much were they?

A. Close on to \$3,000.

Q. Then the equity wasn't over \$10,000?

A. No, sir.

Q. And you were anxious to get out of the country and were willing to take \$7,000?

A. Yes, sir.

Q. You had property then, personally, there worth \$13,000 with mortgages or other liabilities against it aggregating \$3,000. It was worth about ten?

A. Yes, sir.

Q. And you at that time made a lease to your brother which aggregated a return to you of \$925 per month?

A. Yes, sir.

Q. Which would be \$11,100 per year?

A. Yes, sir.

Q. And you insist that no one but yourself had any interest in that?

A. I certainly do.

Q. And you leased that to your brother, property worth \$13,000, at a rate that was to bring you \$11,000 a year?

A. Yes, you can put it that way.

Q. But you were willing to take \$7,000 for it and get out of the country?

A. Yes, sir.

Q. There was no understanding at all, no secret agreement, between your brother and yourself that he really had an interest in that property but that it had to be carried in your name on account of his difficulties with his wife?

A. There certainly was not.

Q. There never was at any time?

A. No, sir."

The statement on page 117 that the lease called

for rentals aggregating \$925 a month is an error to the extent of \$100. That sum included plaintiff's wages of \$100 a month. The lease called for \$825 a month, or \$9,900 a year.

So this phenomenon was offered to the jury and is now presented to this court. Plaintiff owned property worth \$13,000, mortgaged for \$3,000, leaving a net value of \$10,000. He agreed to place it among the assets of a corporation for capital stock worth in property assets \$2,800, and in face value \$7,000, and he did this on the assurance of his insolvent brother that the latter would pay him \$7,000 in cash within a little more than five months. He had worked for that brother, according to his own sworn statement, seven years for his subsistence and a string of unfulfilled promises, yet with child-like credulity he started again for the end of a rainbow in search of a pot of gold. Meanwhile part of this \$10,000 worth of property was leased to the insolvent brother at the rate of \$9,900 a year. And yet Harry Fagerberg wanted to sell his immensely productive holdings for \$7,000 and get out of the country. It will be noted that the lease included only the roadhouses and stores at Blackburn and Chititu and the horses. The sawmill and logs and lumber were not included. Plaintiff estimated that concern to be worth \$9,000 (R. 114). He leased it, therefore, for more than 100 per cent of its value annually.

This may have impressed the jury as a good story and worthy of implicit belief. Apparently it did, for they seem to have fixed damages to correspond with

this amazing earning capacity. To less credulous persons it suggests a get-rich-quick prospectus issued by a shoe-string promoter. Plaintiff was willing to sell for \$7,000 property that he valued at \$10,000 above incumbrances, and part of which was capable of earning \$825 a month. The mill property was also to go in (115). Out of that and a logging contract plaintiff says he could have made \$5,000 in a few months (R. 62-3). Yet with all this easy money coming his way he made a contract to sell everything he had for much less than its annual earning power.

Is not that a declaration that affronts common intelligence? Is it not infinitely more probable that he and his brother owned everything in common and that plaintiff was willing to take \$7,000 for his half interest? The probability fits perfectly with the great array of evidence pointing to a partnership. The following fragment of testimony by plaintiff is commended to the court:

“Q. Why did you make this lease to Al? (Referring to paper).

A. To protect myself.

Q. To protect yourself in what way—why didn't you run the roadhouse if it was so profitable?

A. If any man comes along and makes me a proposition of \$7,000, and I was to get it, I was willing to quit the country.

Q. What I am getting at is—you owned this roadhouse and everything in it, and it was a very profitable business, and you owned the horses, and you figured out you could make good money—a good many hundred dollars per month from them and yet you leased everything to Al Fagerberg and turned in and worked for him for

\$100 per month according to this agreement?

A. Yes, sir" (R. 93-4).

Plaintiff's reiterated assertions that the Carstens Company were a bad lot and that he never trusted them read queerly when contrasted with his statement that he considered that he was working for Thomas Carstens continuously from 1907 to 1913. Several of the reflections on Carstens have already been quoted, but the following is notably pertinent:

"Q. Now, you say that in 1910 the reputation of the Carstens people was very bad up in that country and as far as you knew you would not trust them for anything—from what did you get that impression?

A. The surrounding country.

Q. Do you mean by something somebody had told you?

A. To a certain extent and their dealings in other ways; I was afraid of them.

Q. But you kept on working for them for several years afterwards?

A. To a certain extent; you can put it that way—it wasn't out of consideration for the Carstens Packing Company.

Q. What particular things did the Carstens Packing Company do to you that caused you to have such a bad opinion of them?

A. Nothing particular.

Q. They had left a \$30,000 stock of goods up there in the custody of yourself and brother for three years and had not received a cent for them—is that what caused you to be so hostile to them?

A. No, not necessarily; it was their way of doing business I didn't like.

Q. You say you did the business with them wholly through your brother and never attempted to get into any communication with

them directly?

A. No, but he got his instructions from the Carstens, believe me—he went out every fall.

Q. Do you know what those instructions were?

A. To a certain extent I do.

Q. From what?

A. Just by his conversation and by some letters that came up there later from Mr. Carstens.

Q. You have seen letters from Mr. Carstens?

A. I have, to him.

Q. Have you them in your possession?

A. No, I have not.

Q. Do you know whether Al has them?

A. He has some of them; they will come up later on.” (R. 152-3.)

Plaintiff did not like Carstens' way of doing business after he and his brother had frittered away a valuable stock of goods without making any return. When he got the bill of sale in 1913, according to his own admission, the stock remaining was practically worthless (R. 112). Following plaintiff's testimony just given here is another statement by him that is interesting reading:

“Q. Now, you had considerable difficulty with Al; he collected the money for six years and you never did anything as you have stated until 1913. How did you come to do business with him in 1914? You have stated at various times during the course of this examination that you worked for Al during all the years from 1907 to 1913 and never got your wages out of him. Now, with that fact in view, how did you come to trust him so far as to do any business with him at all in the spring of 1914? What did you have to go on? What was your reason for giving him a lease of

all this property and taking the chances of not getting anything out of him?

A. When he came back in the spring of 1914 with this proposition of incorporation, I said—‘how do I know you are representing the Carstens? You claim you are?’ ‘Well,’ he says. ‘Harry, all I can say is this; I have nothing to show you, but I have a carload of oats down here that I have to pay \$1,500 on; if I draw a sight draft on them and that is accepted by them and goes through, will you believe that they are back of me then,; and I says, ‘Yes,’ and he drew this draft and sent it out and it went through and he got the carload of oats released and I naturally supposed it was a cinch.” (R. 144-5.)

When J. A. Fagerberg secured money from Carstens it seemed to revive plaintiff’s confidence in somebody and induce him to endure the handicap of association with Carstens a little longer. He did not state whether payment of J. A. Fagerberg’s sight draft for \$1,500 was a part of the Carstens way of doing business that he did not like.

C. I. Range testified that plaintiff in April, 1912, asserted that he had a half interest in all the Fagerberg property. Range said, giving in substance the conversation:

“A. It came up with regard to their business over there; they had some trouble about their business; he was talking to me about it, Harry Fagerberg was, and I asked him how he was situated over there, and he said he owned a half interest in the whole thing, and that they were trying to beat him out of it, and I said to him that I would take a club and drive them out if I was in his place.

Q. Drive who out?

A. Al and a lady who was there.

Q. Some woman—do you know her name?

A. Mrs. Damon.

Q. Now, when Harry Fagerberg stated they were trying to beat him out of his interest, to whom did he refer?

A. Al and the woman.

Q. And I understand you to state that he said he owned a one-half interest in everything?

A. Yes, everything they had, the Chititu store and the roadhouse, and store over there at Blackburn, and the mine on Dan Creek." (R. 357).

H. M. Fagerberg gave this version of the same conversation.

"A. I didn't tell him that I owned a half interest in the business—I told him in these words, that I had practically put up half the money to build up the business and I had done the work and didn't intend to be skinned out of it, but I didn't refer to Mrs. Damon when I made the statement that they were trying to beat me out of it.

Q. Whom were you referring to?

A. I was referring to Al and Carstens.

Q. You recollect having this conversation?

A. I do, yes, sir.

Q. Where did it take place?

A. At Dan Creek.

Q. What money did you refer to when you mentioned about this money you spoke of?

A. Money I had let them have from my salary." (R. 379).

Argument can hardly make plainer to an enlightened intelligence that plaintiff engaged in special pleading rather than testifying when he put forth the various statements quoted. To make a suggestion cautiously, it would seem that plaintiff handled facts so carelessly as to do them great damage at times. Turning to the testimony of the voluble J. A. Fager-

berg it is soon observed that he was contradicted by several witnesses including himself. A notable contradiction between him and Carstens and W. C. Prater appears in their accounts of negotiations in the summer of 1913, just before J. A. Fagerberg gave his brother the bill of sale for all the Alaska property in the Fagerberg name. Mr. Prater, treasurer of the Carstens Packing Company, testified that Fagerberg "came to our office and said he wanted to give a bill of sale on all of his property in Alaska to me, and wanted to do it quick" (R. 287-8). Prater's testimony continues:

"Q. To whom?

A. To me personally. He wanted I should hold the title until he got settled with his wife; he was afraid his wife would attach it or start some proceedings and tie it up. I told him that he did not owe me anything and I could not legally hold it, and I would not accept it, as it would only get us into litigation, and would not be binding anyway, and I suggested that he owed Mr. Carstens, and to give the bill of sale to Thomas Carstens. He hesitated a while and then decided to give the bill of sale to Thomas Carstens. Mr. Wilt is our attorney and generally looks after such matters for us; he is employed exclusively for the company, and he was at that time in the East, and would be back on the 17th, and I asked Fagerberg to delay the matter for a couple of days until Mr. Wilt returned and could fix it up for us without going to another attorney. He said he would, so he went away and Mr. Wilt returned in a few days, and I called him up and called his attention to the matter, and he said we would have to get in touch with Fagerberg and get that bill of sale right away, so I made an effort to locate him and found he had left the city.

Q. Fagerberg had left the city?

A. Yes. He was dodging his wife, expecting her to have him arrested at any time for defaulting in his payment of alimony and put him in jail, and he had hid at La Conner, and Mr. Wilt made a trip up there and spent a day there, but failed to catch him; he dodged him; he got wind of some one looking for him and he skipped and Wilt came back to Seattle and took the matter up with Mr. Custer, his brother-in-law."

Prater then testifies that Custer later located Fagerberg and arranged a meeting of the three at a hotel in Everett. When they met Fagerberg he stated that he had already given a bill of sale to his brother, Harry Fagerberg (R. 290). Prater then asked him to go to Tacoma and see Mr. Carstens, but Fagerberg at first objected, saying he was afraid he would be arrested. He was persuaded to go along with Prater and Custer. At Tacoma he agreed with Carstens to go to Alaska at Carstens' expense to get title to the Alaska property and straighten out the business. Prater was instructed to get a steamer ticket for Fagerberg, which he did, but the evening Fagerberg was to sail he called Prater up on the telephone and said "he was afraid to go to Alaska unless we would agree to pay his back alimony in case they arrested him up there and he would have to pay or go to jail." Prater told him he would have to see Carstens about that and there the matter seems to have dropped (R. 290-1).

In answer to the question whether Fagerberg in the Tacoma negotiations gave any reason for having executed the bill of sale to his brother Mr. Prater answered:

“He stated that the bill of sale was made to his brother for the sole purpose of keeping his wife from getting hold of the property” (R. 292).

Thomas Carstens corroborated part of the testimony of Mr. Prater just cited (R. 320-1), and in answer to the question whether Fagerberg gave any reason for transferring the Alaska property to his brother, said (R. 321):

“The reason he gave for assigning the property to his brother was on account of trouble he was having with his wife; at that time he had a divorce suit pending, and he feared his wife would attach his property and he wanted to turn it over to us, and as Mr. Prater refused to take it, he turned it over to his brother.”

J. A. Fagerberg's account of his conversation with Prater is as follows:

“Q. When did you first see Mr. Carstens or Mr. Prater in the summer of 1913?

A. It was right after the fourth of July; I had been home a day and I went down to Mr. Prater and said, ‘How about that old mess out there,’ and I said, ‘I am going to turn it over to Harry, if you don’t take it,’ and he said, ‘I won’t have anything to do with it, go ahead,’ and I says, ‘All right,’ I says, ‘The deal is off now all right; your old Nizina stock is gone and what money I have put in we have lost’; he said, ‘all right, I won’t have anything to do with it,’ and I went to Mr. Custer and said, ‘George, make out a bill of sale for that stuff up there,’ and I gave him the items and that evening I left.” (R. 200).

Defendants’ counsel submit without argument the issue which of these conflicting accounts is true;—that of Carstens and Prater, who had dealt liberally and fairly with Fagerberg and trusted him for years,

or that of Fagerberg, who seems to have kept no promises, even to his brother. On pages 200-1-2-3-4-5-6-7 of the record Fagerberg gives a rambling account of negotiations with the Carstens people which bears throughout the impress of reckless statement. He had already twice asserted (R. 173-202) that Carstens became greatly excited over the Shushanna strike shortly after the bill of sale was given to H. M. Fagerberg July 15, 1913. As evidence of that he introduced a letter from Carstens which appears on pages 174-5 of the record. This letter refers to the possibility of getting the Alaska property turned back to Harry Fagerberg and discusses an investigation and report by J. A. Fagerberg on the business outlook in the district. It refers particularly to the horses and concludes:

“In case they are not doing well and the chances of earning money are not favorable would advise you to dispose of the horses to best advantage and when you come back then will be the best time to talk things over carefully and decide how to proceed right.”

It is respectfully submitted that this letter does not betray great excitement or mental strain, and is not the letter of a man who was offering unlimited backing to a party who had used up a valuable stock of goods without making any return. And here is a good place to show where Fagerberg contradicted himself, although his counsel insisted that there was no contradiction and the trial judge expressed a doubt. Let this court decide. Defendants' counsel read to Fagerberg from the transcript of his testi-

mony in his bankruptcy proceedings and the record shows the following (R. 207-211):

“ ‘Question: What was the arrangement you had with Carstens or the Carstens Packing Company about these goods that were shipped up last spring?’

Answer: After I went to Prater and gave him this talk, told him to protect himself and Harry and do what was right, shortly after, why the Shushanna stampede started in and they got excited, anything I wanted then they would advance, they would pay my back alimony—I didn’t have a dollar, I went broke on the Kruhm deal. They first started in to hunt me and some of the boys thought that somebody was after me and they said, ‘Get out of sight,’ and I went back home, and then Custer got hold of me by telephone, and he said, ‘They want you to come up here,’ and then they wanted me to go back on account of the Shushanna stampede; that was along in August, 1913, and I went so far—Wilt got me over there in Tacoma and says, ‘You are the only fellow that can go back there and get it back and we will do something with it.’ I says, ‘I will think about it,’ and he says, ‘Well, if you ain’t got the money we will advance you money to pay your back alimony and everything else, go ahead and take hold of it again and we will stay with you,’ and I said, ‘All right,’ and Prater agreed to it and when I came home my own folks said, ‘Nothing doing, you stay here until you get this other settled up,’ and my sister gave me \$45 so I could go to Cordova and the rest of the way I was to beat my way—that was in August, 1913.’ Is that a correct statement of your testimony last fall?

A. That is incorrect there—that \$45 I got from the Carstens Packing Company.

Q. This is a conversation between you and your home folks, you say, after talking about

your conversation with the Carstens, my own folks said, 'nothing doing,' etc.?

A. My sister didn't give me the \$45—that is a mistake.

Q. You think that is a mistake of the stenographer's notes?

A. That is a mistake in the stenographer's notes—I was talking too fast for him.

Q. Is this also a mistake—near the bottom of Page 20; you remember the question and answer I read you a while ago wherein I asked you about your conversation with Mr. Wilt to the effect that you wanted to get this out of your name so your wife couldn't get it, and you answered 'I never talked to Mr. Wilt about it.' Now, on the same page you say, 'Wilt got me over there in Tacoma, and says, 'You are the only fellow that can go back there and get it back and we will do something with it.' I says, 'I will think about it,' and he says, 'Well, if you ain't got the money we will advance you money to pay your back alimony and everything else'! Now, which of those statements is correct, the statement made near the top of Page 20—that you never talked to Wilt about this, or the statement at the bottom of the page that he offered to pay your back alimony, etc.?

MR. DONOHUE. We object to that—there is no contradiction in that.

THE COURT. I am not sure that there is a contradiction at present. If you find it and point it out to him, you may ask him.

Q. Read that question and answer—read to the bottom of the page (Handing witness paper). What I want to get at is, did you or did you not talk to C. F. Wilt about your trouble with your wife?

A. No, I didn't talk to Mr. Wilt about the trouble with my wife. He went with me to the office; Prater, Custer and Carstens had had a conference there in Tacoma and Mr. Wilt came in to it, and we walked out over the bridge there

and I was going to take the boat and he was going up-town and I couldn't state just what the statements were, but as far as Mr. Wilt being in on the conversation or statements, I don't remember anything about it.

Q. You say you never talked to him and he never talked to you?

A. He never talked to me directly on anything of that kind. Mr. Carstens was the man—Mr. Prater was the man I went direct to.

Q. The question of back alimony never came up when Mr. Wilt was present?

A. Not when Wilt was present—it was between I and Mr. Carstens.

Q. In other parts of your testimony that you gave in that examination you stated and I believe you stated this morning, if I understand you correctly in answer to Mr. Donohoe's question, that as soon as the Shushanna stampede started, Mr. Carstens was anxious for you to go up there and got after you—Now did they or did they not as one of the inducements offer to pay your back alimony to avoid trouble with your wife?

A. They offered to pay it, yes, sir.

Q. What was the final result of that?

A. Mr. Carstens asked me the amount and one thing and another—I can't recall exactly what was said.

Q. That dicker fell through entirely then?

A. Well, when I wouldn't go back, I called him up over long distance; I was up at my brother-in-law's and he said, 'All right,' and he says, 'We will just let it drag along.'

Q. It was dropped then?

A. It was dropped then indefinitely."

The court will note that Mr. Fagerberg believes he talked too fast in one stanza for the stenographer. Careful scrutiny of all his testimony indicates that he conversed on the witness stand at all times with too

much speed for careful thinking. It was this which led him into the contradiction, which is so plain that he who runs may read.

On pages 208-9 Mr. Fagerberg avers rapidly. "Wilt got me over there in Tacoma and says, 'Well, if you ain't got the money we will advance you money to pay your back alimony and everything else.' "

On page 210 Mr. Fagerberg says, "I didn't talk to Mr. Wilt about the trouble with my wife." Farther down on the same page he says the question of back alimony never came up when Wilt was present.

That will be about all for Mr. Al Fagerberg. The court will note that Carstens and Prater testified by depositions taken several months before the trial. They had no opportunity to deny specifically numerous loose statements in Fagerberg's fluent remarks, but by anticipation denied enough to raise squarely the issue of veracity.

The second assignment of error (R. 441) alleges error on the part of the court in admitting the testimony of the plaintiff, over the objection of defendants, as to speculative profits he might have made in conducting the Blackburn roadhouse and using the attached horses if the attachment had not been made. It also alleges error in admitting testimony of profits at all in view of plaintiff's evidence that he was working for wages. The testimony to which defendants objected appears in the record on pages 51 to 63 inclusive. Several objections were sustained by the court but plaintiff was allowed to make loose estimates based wholly on his own alleged opinions of the

business he could have done at the roadhouse and with the horses. Counsel for defendants insisted at the trial (R. 55-6) and reassert here, that as plaintiff was working for \$100 a month when the action complained of was brought and when the first levies of attachment were made he was estopped to show what he could have made by use of the property, since he would not have used the property himself if the attachment had not been made. He sought to evade this by showing that the property was turned back to him by J. A. Fagerberg between the first and last levies, which were several days apart, but that was merely begging the question since the attempted change in possession of the property involved was due to the attachment. That is undisputed.

On the question of profits plaintiff testified as to conditions at the roadhouse during the month preceding the attachment. Although he had testified that he was working for wages as a packer and mail carrier it is interesting to note how easily he and his counsel slipped into speaking of the roadhouse as if plaintiff had been running it for some time previous to the attachment (R. 52-3). Plaintiff stated (R. 54) that his profit on a guest was about \$2 a day. Following the statement was this testimony:

“Q. You say during the month of July or about the time this attachment was made, to be more exact, you think the average of your guests on or about that time was about seven or eight?

A. Yes, sir.

Q. And you made \$2.00 on each guest?

A. Yes, sir.

Q. And that the conditions in there last fall

were such that you would have continued to have had about the same number of guests each day and make the same profit off of each one?

A. It would have been more; the business would have been better.

Q. You wouldn't make as much money as that along in the winter, would you?

A. No, sir.

Q. How are business conditions up there in the month of November, we will say?

A. Along in November——

MR. RITCHIE. We object to this kind of questioning—it is nothing on which to base an action for damages. You have to show it by actual figures. This is too speculative.

Objection overruled. Defendants allowed an exception.”

During the month of July, plaintiff had already testified, he was packing and carrying mail with the horses he purported to have leased to his brother.

Plaintiff then proceeded to give his opinion as to how much he could have made during several months following if the roadhouse had not been attached. defendants repeatedly objecting (R. 54-5). On page 56 occurs the following:

“Q. Now, had you remained in the possession of that roadhouse, and knowing the conditions of business generally at McCarthy and the possibilities of this roadhouse business, what would you say would have been the average number of your guests during the month of November, 1914?

JUDGE LYONS. We renew our objection.

Objection overruled and exception allowed defendants.

A. Well, perhaps, three, straight through.

Q. November?

A. Yes, sir.

Q. What about December?

A. Practically run about the same.

Q. It would run the same all winter?

A. Until about the first of February.

Q. Then it would improve?

A. Yes, then it would improve again.

Q. How are conditions up there in the spring at McCarthy, in a business way, quiet?

A. Quiet to a certain extent; yes, sir.

Q. Do you think that the average number of guests you have named would have continued up to the present time?

MR. RITCHIE. We object to that as leading and suggestive.

Objection sustained.

Q. How many guests do you think there would have been between the first of February and this date at the Blackburn roadhouse?

A. That is a rather hard question to answer but on an average, take it as a whole, why I should say about 120 guests per month, straight through on an average.

Q. Four a day?

A. Yes, sir."

On cross-examination plaintiff reduced his estimated profit to \$1.50 a day on each guest (R. 130). He also admitted that there would be little profit on a small number of guests (R. 131).

Plaintiff then testified to the amount of money he could have made at packing with horses at stated rates per pound; asserting that he could have kept the horses steadily employed (R. 57-8-9). This testimony reads like a calculation on the profits of hen culture, it being assumed that the industrious hens

will lay a stated number of eggs each month and that some miraculous power will maintain an excellent price for eggs. Next he testified (R. 59-60-1-2-3) that he could have made a large amount of money out of a timber contract and cordwood. This assumption was based on the fact that "the Kennecott Mines Company advertised for bids on a certain amount of timber" (R. 60), and he could have made 3 cents a foot on it if he had been given the contract. He seems to have expected the jury to assume that he would have had the contract but for the attachment of the horses.

It is hardly necessary to cite law to this court to show that a man cannot claim damages for loss of profits on a contract he believes he might have obtained if he had asked for it. He offered no evidence that he was assured of the contract under any circumstances. After plaintiff told what he might have done the record reads as follows (p. 62-3):

"Q. As a result of these things that you have just testified to, what would you say was the total damage by reason of being deprived of those horses from the 20th day of October until the present time?

JUDGE LYONS. We object to that; he must show each particular place he was damaged.

MR. DIMOND. I ask him to base his opinion on the items he has mentioned and this logging contract particularly.

Objection overruled; defendants allowed an exception.

A. On the mining and logging I could practically have made \$5,000.

Q. How long would that logging have lasted?

A. It could have lasted all spring, up until the packing set in.

Q. How much was there of it, did you say?

A. There was one hundred thousand feet of mining timbers.

Q. You mentioned something about cord wood—what was that?

A. That was for the mine.

Q. How much?

A. Two hundred cords.

Q. How much would that cost you to get it out?

A. I wouldn't have made so much on that, but would have made practically about one dollar a cord clear—that is all I could have made on that,—that is allowing \$2.50 per day for the horses.

Q. Now, you figure it—100,000 feet of timber you say you could have made three cents per foot on; that is \$3,000 and \$200 on wood, and you state you could have made altogether \$5,000—where is the rest of it?

A. On account of the logging proposition—I was getting under my agreement with Borger and Struck \$2.50 per day for every day I put in getting out logs.

Q. Where were these logs used?

A. At the Borger-Struck mill."

From plaintiff's testimony the following interesting situation is made to appear. He had worked for wages for his brother and Thomas Carstens continuously from August, 1907, until August, 1914, except the few months between July, 1913, and March,

1914, when he claims to have been in business for himself. After those seven years of service he held in his own name property that he was willing to sell for \$7,000 at a time when business conditions were such that he feels sure he could have made at least \$5,000 clear of expense in a few months following if the attachment had not been levied. And still he admits that if the Carstens attachment had not intervened he would have continued to work for \$100 a month and board and let somebody else clear up the \$5,000 on the roadhouse and horses, which \$5,000 he persuaded the jury was practically a sure thing, as that remarkable squad of citizens gave him a verdict for \$4,750 damages for loss of profits in nine months next ensuing. (See verdict, R. 412.) Here is plaintiff's own admission on cross-examination (R. 132-3):

“Q. If there had never been any attachment, you would have gone on working for \$100 per month?

A. Yes, sir.

Q. And that would have been the extent of your profit?

A. Yes, sir.”

As showing the bias of the jury it is worthy of mention that in their verdict they practically accepted all of plaintiff's valuations of property, as well as measurement of damages. They fixed the value of five horses at \$1,000 (R. 411), which was plaintiff's appraisal of \$200 each (R. 49-50). Yet he had admitted that he bought two of them the year before for \$285 and one for \$75 (R. 97-8).

This brief has not heretofore discussed the law

of the case because it seemed more logical to place first before the court enough of the essential testimony to give the court complete grasp of the principles of law involved. Having just quoted testimony on the question of profits we will proceed with our view of the law on that.

It is elementary that in an action like the one at bar only such damages may be recovered as can be actually proven; that all remote and speculative damages must be excluded. The rule is thus laid down in *Howard vs. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199-206, a case often cited since in supreme court and other reports:

“The grounds upon which the general rule of excluding profits, in estimating damages, rest are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages.”

The other reasons stated by the court refer to breaches of contract. This statement of the law is approved in *Fidelity Company vs. Bucki Company*, 189 U. S. 135-142, a case in which damages were sought on account of an attachment. In affirming the judgment the supreme court approved the following from the instructions of the trial court to the jury, found on page 140 of the opinion:

“Every author of authority referred to, even by the plaintiff’s attorney, says there must be some certainty.

“Now the certainty of profits here depends upon this: It is claimed that on account of these

attachments the plaintiff's credit was injured; that had it not been for the attachments, money could have been borrowed, timber land or stumpage could have been procured, logs could have been procured profitably; if logs could have been procured profitably, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the court cannot say that there is sufficient to justify the jury in finding perhaps large damages against the defendant in this case on account of loss of credit and profit—from the levying of the attachments.”

The statement of the law already given from the *Howard vs. Stillwell* case, is also cited with numerous other authorities in *Cincinnati Gas Co. vs. Western Siemens Co.*, 152 U. S. 200, on page 206.

In *Williams vs. Island City M. & M. Co.*, 37 Pac. 49 (Ore.) this subject is discussed at some length with numerous citations of cases. On page 51 the opinion says:

“In many cases, profits are the only certain or reliable measure of damages; but as a general rule the expected or anticipated profits of a business enterprise cannot be proven with any degree of certainty, and therefore cannot be recovered. They can only be computed or ascertained by guess or speculation, because they depend on so many contingencies, such as competition in business, supply and demand, the condition of the money market, availability of labor, and like uncertain conditions. There may be future profits in any business, or there may be losses. ‘Hence, in such cases, the measure of damages is,’ says Mr. Sedgwick, ‘not expected profits, but the average value of the use of the business; and, to ascertain this, evidence of actual past profits must be admissible. 1. Sedg. Dam. Sec. 174.’”

Possibly as fair an exposition of the rule as can be found is in the following from Sutherland on Damages:

“The objection that the damages are uncertain and speculative is insuperable when they are incapable of estimation and proof with that degree of certainty requisite to establish facts for the consideration of a jury. There should be no distinction as to the degree of certainty required in proof between this fact and any other upon which either the right to damages or their amount depends. A conservatism, however, pervades generally the law of damages; and it being the common experience that there is a wide difference between the theoretical or speculative profits estimated in advance, without any actual data, and the result usually achieved when the scheme is put in practice, it is necessary that the law should discard what is merely fanciful or possible and only permit those profits to be considered which have some basis of actual facts to support them.” Sec. 867.

“When it is advisedly said that profits are uncertain and speculative and cannot be recovered when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because they are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore, it is more a general truth than a general principle that a loss of profits is not ground on which damages can be given.” Sec. 868.

The following cases also lay down the law to the same effect:

“The measure of damages for the wrongful suing out of an attachment is such sum as will

compensate the injured party for the injury fairly and impartially, and the jury in an action therefor cannot speculate by taking into consideration any hopes of future profits or successful enterprises. *Kennedy vs. Meacham*, 18 Fed. 312; *Holliday Bros. vs. Cohen*, 34 Ark. 707; *Pollock vs. Gantt*, 69 Ala. 374, 44 Am. Rep. 519.

Mere possible or speculative expectations of profits and collateral advantages are not to be taken into account. *Myers vs. Farrell*, 47 Miss. 281.

An attachment of a stock of goods which was wrongful but not malicious does not authorize a recovery against the attaching creditor of the profits which the debtor might have made in his business, had it not been interrupted by the attachment, as the amount would have been too conjectural. *Braunsdorf vs. Fellner*, 76 Wis. 1, 45 N. W. 97.

An attachment of a stock of goods which was wrongful but not malicious does not authorize a recovery against the attaching creditor of the profits which the debtor might have been made in his business, had it not been interrupted by the attachments, as the amount would have been too conjectural. *Braunsdorf vs. Fellner*, 76 Wis. 1, 45 N. W. 97.

And claims for loss of profits in the retail of goods wrongfully attached, and loss of business and custom, and loss of credit, are properly stricken out in an action for a wrongful attachment, as not being such elements of damages as are proper subjects of allegation or proof. *Lowenstein vs. Monroe*, 5 Iowa, 82, 7 N. W. 406.

And damages sustained from a wrongful attachment by reason of the fact that the person attached was making advances to timbermen and others, and thereby had become interested in the handling of timber and crops, and that, owing to his mercantile business being stopped by the attachment, he lost these advantages, and

lost his advances and the shipment of his timber, are too speculative and remote for recovery in an action for the wrongful attachment and proof to that effect is inadmissible. *Pollock vs. Gantt*, 69 Ala. 373, 44 Amer. Rep. 519.

Whether a steamboat could or could not have earned anything during the time she was in the custody of the sheriff under attachment, is a matter of speculation which is not susceptible of proof, and damages for the loss of such earnings cannot be recovered in an action for a wrongful attachment of the boat. *Callaway Min. & Mfg. Co. vs. Clark*, 32 Mo. 305."

A fatal objection to plaintiff's attempted proof of damage through lost profits is that his proof consisted wholly of his unsupported testimony as to the business he believes he could have done but for the attachment. Leaving out of this phase of the argument the fact that he would not have been in business for himself at all but would have been working for a monthly wage of \$100, which up to the time of the attachment he had not collected, still he did not meet a settled requirement of the law that proof of anticipated profits must be based on past experience. He offered practically no proof at all of past performances, and thus failed to meet a rule of law that is not doubtful.

"It is a very easy matter to figure out a large profit upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance." 1 Suth. Dam. Sec. 64.

"If a regular and established business is wrongfully interrupted the damage thereto can be shown by proving the usual profits for a reas-

onable time anterior to the wrong complained of. But it is otherwise where the business is subject to the contingencies of weather, breakages, delays, etc." Id. Sec. 70.

In support of defendants' contention that the evidence conclusively established the existence of a partnership between the Fagerbergs the following authorities are cited:

"Wherever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is so as to third persons. All of the decided cases, however, agree that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties. On the other hand, it is equally clear that there may be such a community of interest in the profits without regard to loss, and without any community of interest whatever in the property as will establish that relation. Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention. But merchants and traders are often justly held to be partners as to third persons, where they are not to be deemed such, expressly or impliedly, as between themselves." *Berthold vs. Goldsmith*, 24 How. 536-541-2.

"Where there is a community of interest in

the property and also a community of interest in the profits, there is a partnership." 2 Greenleaf Sec. 482.

"A partnership may exist in a single transaction as well as in a series." *Story, Partn*, Sec. 21. *Pothier, Contrat de Societe*, No. 54; 3 Kent Comm. 30. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, it is a partnership trade, although it is confined to a single thing.

"If they hold themselves out to the public as partners those who deal with them have a right to so regard them, and they will be bound as partners." *Re Warren*, 2 Ware, 322, Fed. Cas. No. 17,191.

"One may estop himself from denying his liability as a partner, where such relation does not exist in fact, by holding himself out as such, or by negligently permitting one to do so with whom he is engaged in business." *Rider vs. Hammell*, 66 P. 1026.

"A co-partnership may be established by the dealings of the parties, and other circumstances from which it may be implied." *Reliance Lumber Co. vs. White*, 38 S. W. 391.

"As to third persons, acts and declarations of the parties are sufficient evidence of their partnership." *Robinson v. Green*, 5 Harr. 115 (Del).

"It is sufficient to show that persons have acted as partners, and that, by their habit, course of dealing, conduct and declarations, they have induced those who have dealt with them to suppose that they were partners, to make them liable as such." *Chase vs. Stevens*, 19 N. H. 465.

Counsel for plaintiffs in error respectfully submit that the record shows sufficient errors of law to call for a reversal of the judgment of the trial court and the award of a new trial, and that in addition the verdict and judgment are so clearly against the

weight of evidence as to justify a reversal on that ground also. On both grounds plaintiffs in error are entitled to a *venire de novo*.

C. F. WILT and
LYONS & RITCHIE,
Attorneys for Plaintiffs in Error.



No. 2679

IN THE
UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

F. R. BRENNEMAN, U. S. Marshal,
and
JAMES M. MILLSAP, Deputy U. S. Marshal,
Plaintiffs in Error.

vs.
H. M. FAGERBERG,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE DISTRICT COURT,
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

T. C. WEST and
DONOHUE & DIMOND,
Attorneys for Defendant in Error.

Filed this..... day of April, A. D. 1916.

..... Clerk.

By..... Deputy Clerk.

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STATEMENT OF THE CASE.

In this brief the plaintiffs in error will be referred to as the defendants, and the defendant in error as the plaintiff, as in the court below.

As stated by the defendants, this is an action to recover certain real and personal property seized under an attachment in an action to which the plaintiff was not a party, and damages for the attachment which is alleged to be wrongful. The facts are as follows: On the second day of August, 1914, the defendant Millsap, a Deputy United States Marshal,

appointed by and acting under defendant Brenne-
man, who is United States Marshal for the Third Ju-
dicial Division of Alaska, received for execution a
writ of attachment in a case in the court below in
which Carstens Packing Company, a Corporation,
was plaintiff and J. A. Fagerberg was defendat, and
in which the plaintiff sought to recover of defendant
a judgment in the sum of more than \$6,700.00. About
one-third of this sum was on a judgment recovered
by the Carstens Packing Company against J. A. Fag-
erberg in the Superior Court of King County, Wash-
ington, and for the remainder for sales of goods,
wares and merchandise and for money advanced.
The complaint in this action appears on page 407 of
the record, and its outline is thus early stated because
it is so material as to necessitate its being borne in
mind at every stage of the argument.

Defendant Millsap executed this writ of attach-
ment on the 2nd day of August, 1914, by attaching a
merchandise store of J. A. Fagerberg's. On the 3rd
and 4th days of the same month he attached other of
the property of J. A. Fagerberg, all of such property
so attached being of the value of about \$5,800.00 (R.
183-184). Later, on the 6th day of August, 1914,
Millsap, acting under the express instructions of the
plaintiff in that case, Carstens Packing Company, at-
tached a large roadhouse, barns, outbuildings, and
five head of horses in the possession of and claimed
by the plaintiff H. M. Fagerberg, three of the horses
having been purchased by him out of his own funds.
Regardless of the claim of the plaintiff, the Deputy

Marshal Millsap, forcibly ejected plaintiff from the roadhouse, and took forcible possession of all of the property. Outside of the return of defendant Millsap to the writ of attachment (R. 236-7) the only record of the actual manner in which the attachment was made appears on page 45-46-47 of the record, as follows:

“Q. When did the next attachment take place?

A. I believe it was on the 8th day of August.

Q. Where were you at the time?

A. I was at the roadhouse working. He came up——

Q. Who did?

I.

A. Millsap and his deputies—he had three deputies with him—and he said he had an attachment for the whole concern, buildings and horses and everything; he said they had to go ahead and serve an attachment. I said, “Do you know what you are doing?” “Yes,” he says, “I thoroughly understand what I am doing.” “Well,” I says, “I won’t give up possession, you will have to put me out.” “Well,” he says, “if that is necessary, I will do that,” and I says (43-26) “Go ahead and do it,” and he took me by the shoulders and led me out. I told him, also, about the bill of sale and his deputies so they could see what they were doing exactly and they knew what they were doing at the time.

Q. Where were you at the time?

A. I was in the roadhouse.

Q. He put you outside the door?

A. He put me outside the door, yes, sir.

Q. Did you tell him that that property was yours?

A. I told him they belonged to me.

Q. Where were they at that time?

A. They came in that evening; took them down to Breedman's barn.

Q. Did you tell him the horses belonged to you?

A. I did.

Q. In whose possession was all this property at the time the attachment was made?

A. The possession of the property of the roadhouse, that was in my possession; of course, I don't claim any of the stock of goods that were shipped in there by my brother or Mr. Carstens.

Q. What about the horses?

A. I claim the horses; the horses were mine.

Q. Were they in your possession at the time attachment was made?

A. They were; yes."

This is the testimony of the plaintiff but it stands absolutely undisputed in the record, and there is no doubt that the attachment was made in exactly the manner described. It was to recover the possession of all this property, or its value, and damages for the wrongful attachment, this this action was taken.

Defendants' first answer admitted that the property was in the custody of the plaintiff on August 6, 1915, the date of the attachment, but denied that he had any right to the possession thereof except as the agent or bailee for J. A. Fagerberg, the defendant named in the writ of attachment under which the property was seized. Later an amended answer was filed in which the defendant alleged that the plaintiff and J. A. Fagerberg were general parteners, but that at the time of the attachment and of their first answer this fact was not known to them. During the trial the answer was further amended so as to read

as it now appears in the record on page 5, *et seq.* It is only fair to state at this time that all of these answers were verified by defendant Brenneman, in Alaska, and were prepared by attorneys in Alaska upon information furnished by the attorneys of the Carstens Packing Company, in Seattle. These amended answers sought to justify the attachment under the theory that the plaintiff and J. A. Fagerberg were at all times partners, and therefore, that all of such property could be lawfully attached for debts owing by such partnership, or by either partner individually.

It may be well at this time to recite something of the antecedent history of the Fagerbergs and Carstens Packing Company and its officers. Previous to the year 1907, the Nizina Trading Company, owned and controlled by the Carstens Packing Company and its President, Thomas Carstens, and one Herman Meyer, had established a store and had been doing business on Chititu Creek in the Nizina mining district. In the spring or early summer of 1907, the Nizina Trading Company gave a bill of sale to J. A. Fagerberg, for all the property and J. A. Fagerberg employed his brother, the plaintiff here, at a salary of \$1,500.00 per year, to take charge of the store. Mr. Prater, an officer of the Carstens Packing Company, states that this change was made for the purpose of J. A. Fagerberg's operating the store, and so as to change the name of the store in the eyes of the public (R. 286-287). H. M. Fagerberg remained in actual charge of the store until the fall of 1910, and from that time on it was run by several different persons

at intervals, and was closed for a part of the time. During the winter of 1910-11 a store and roadhouse were erected at Blackburn, near the terminus of the Copper River & Northwestern Railway, by J. A. Fagerberg, but both of the brothers were actually engaged in working thereon. This place was at first conducted by J. A. Fagerberg but was leased to one S. O. Breedman on the 16th of November, 1912, at \$200.00 per month, and remained in possession of Breedman until about the 1st of March, 1914. J. A. Fagerberg left Alaska in November, 1912, and in June, 1913, in the City of Seattle, executed to his brother H. M. Fagerberg, the plaintiff, a deed and bill of sale, conveying to his brother all of his property in Alaska, including the Blackburn roadhouse, horses, and all other personal property used in connection therewith in satisfaction of H. M. Fagerberg's claim against him for wages from 1907 until the date of the transfer, and the deed and bill of sale was immediately placed of record in the proper recording district. In February, 1914, J. A. Fagerberg returned to Alaska, and on March 24th leased from the plaintiff all of the property in question, under a contract to pay to the plaintiff \$200.00 per month for the Blackburn roadhouse and store, \$25.00 per month for the Chititu store, and \$2.00 per day apiece for ten head of horses owned by the plaintiff. This agreement was by its terms to expire September 23rd, but the plaintiff testified that the agreement really was entered into on March 4, though not reduced to writing until March 23, and was to expire on September 4 (R. 145). But between the 2nd and the 6th day of

August, 1914, all of the property claimed by both H. M. Fagerberg and J. A. Fagerberg was attached under a writ of attachment in the action of Carstens Packing Company against J. A. Fagerberg, as before recited.

The testimony on the question of partnership was conflicting. Carstens testified in one place that J. A. Fagerberg told him of a partnership existing between himself and his brother. Prater "understood" there was a partnership. Both J. A. and H. M. Fagerberg denied that they were partners, though they might have permitted themselves to be known as such.

ARGUMENT.

Since the defendants have chosen to consider all of the assignments of error together, we shall do the same, and content ourselves with argument upon the two main questions on which they have based their assignments of error, viz., the question of partnership between J. A. and H. M. Fagerberg, and the question of damages found in favor of the plaintiff in the sum of \$4725.00 and reduced by the court to \$3,000.00, on account of the wrongful attachment. We shall later advert briefly to each assignment of error separately.

Counsel for the plaintiff are still somewhat at a loss to understand, either, how an action can be maintained against partners upon a joinder of individual and firm obligations, or, how partnership property

can be validly levied upon, as was attempted in this case under the theory of defendants, upon a writ of attachment issued in an action against one partner, for the firm's, and for such partner's individual obligations joined. We have always supposed it a principle of elementary law that partnership obligations are joint, and not joint and several, in the absence of an express statute, and that an action against one partner for the firm obligations cannot withstand a plea in abatement. The leading case on the subject is *Mason vs. Eldred* 73 U. S. 231, where the question is thoroughly discussed, and the doctrine announced therein is so well settled that we shall not quote any of the language to this Court.

But under the theory on which this case was tried that question is not very material, except as showing the desire of the Carstens Packing Company to grab everything in sight regardless of ownership, for the plaintiff denies that he was at any time a partner of any kind of J. A. Fagerberg, and alleges that the property for which he brought this action was his individual property to which J. A. Fagerberg had no manner of claim or interest at the date of the attachment. Therefore, the first question to be determined is whether the verdict of the jury and its special finding that the plaintiff and J. A. Fagerberg were never partners is based upon sufficient evidence. On this question the only direct and positive testimony is that of the plaintiff and J. A. Fagerberg, and each denies in positive terms that any such partnership existed at any time.

In this connection, it was proven, and not denied

by the plaintiff, that the plaintiff permitted himself to be held out as a partner of J. A. Fagerberg, by means of billheads containing the inscription "Fagerberg Brothers," and otherwise. And we fully recognize the rule that, where one is not actually a member of a partnership, but holds himself out, or permits himself to be held out as such, he is estopped to deny the partnership as to one who advances credit to the firm on the strength of the supposed relation, or to one who deals with such supposed firm with no knowledge that such person is in reality a partner. So in this case if Carstens Packing Company dealt with J. A. and H. M. Fagerberg, believing that they were partners and that their property was partnership property, then it matters not if they really were not partners. Each is estopped to deny it by his own conduct, whether intended or the result of carelessness. But this doctrine of estoppel does not extend to one who knows the real relations of the parties, and knows that they are in reality not partners, although for convenience, or through carelessness, one permits himself to be held out as a partner of another. There is no reason then to invoke the doctrine of estoppel, as no one is deceived by such holding out of the individual as a partner. Counsel for the defendants did not deny this proposition of law in the court below, but on page 4 of their brief they state that it raises a quasi-estoppel. That it does not raise an estoppel of any kind is amply proved by the following case:

Thompson vs. First National Bank of Toledo,
111 U. S. 529-28 L. Ed. 507,

in which the Court said :

“The Court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transactions with the partnership. The Court declined to give this instruction ; and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out and did not rely on him for the payment of the plaintiff’s debt or give credit to him, in whole or in part.

This Court is of the opinion that the Circuit Court erred, in the instructions to the jury and in the refusal to give the instructions requested.

A per son who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits and is sought to be charged for its debts because of having held himself out or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such holding out. In such case, the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partner-

ship. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact and whom he never understood or supposed to be a partner, at the time of dealing with and giving credit to the partnership.

There may be cases in which the holding out has been public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel *in pais* a question of fact for the jury, and not of law for the Court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same; that one who had no knowledge or belief that the defendant was held out as a partner and did nothing on the faith of such knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact."

In 30 Cyc. 394, the rule is stated clearly:

"But the rule now generally recognized is that, although one holds himself out or permits himself to be held out as the partner of another that does not make him so in fact or render him liable as such, except as to those who are misled such holding out and who have extended credit on the strength of the supposed relation."

This doctrine is universally recognized and has been announced in substantially the same language in the following cases:

Downie vs. Savage (Wash.), 129 Pac. 1096.

Bowen vs. Epperson (Mo.), 118 S. W. 529.
Steele vs. Michigan Buggy Co. (Ind.), 95 N. E., 435.
Webster vs. Clark (Fla.), 16 So., 601.
Seabury vs. Bolles (N. J.), 16 Atl., 54.

and a host of others.

Now let us see what evidence there is in the record as to the partnership or absence of a partnership. The plaintiff positively denies it. Near the end of his cross examination appears the following question and answer:

“Q. You stand then on your proposition, that at no time you were a partner of Al. Fagerberg?”

A. I certainly do.” (R. 140.)

and the whole record of the testimony of both the plaintiff and J. A. Fagerberg is filled with skillful endeavors on the part of the counsel for the defendants to wring from them an admission that they were partners, but with no success. (R. 194-195.)

But there is in the record (Page 34) a lease of the whole Blackburn property to S. O. Breedman, and attached to it an assignment of the rents to S. Blum & Company, to be applied on the mortgage held by S. Blum & Company on the property in question. It is dated the 16th day of November, 1912, and is executed by J. A. Fagerberg alone. Therefore on the question of the general knowledge of a partnership, or rather, on the knowledge by the persons with whom they deal of the real relations of J. A. Fagerberg and H. M. Fagerberg, this instrument is almost conclusive. It shows positively that the men with whom J. A. Fagerberg did business were aware of

the real relations of himself and H. M. Fagerberg and goes far to negative the theory of the defendants that they were partners. At that time, according to the testimony of the plaintiff there was still about \$2,600.00 due to S. Blum & Company on the mortgage which it held on the property. It is true that the plaintiff signed the mortgage to S. Blum & Company but he testified, and his testimony is not contradicted although the defendants might have called as a witness either Mr. Blum or Mr. Brock, either of whom would have been free from a suspicion of bias, that he signed the mortgage at the express request of Mr. Brock, who was the agent of S. Blum & Company (R. 194). This was before the execution of the lease, and apparently at that later date, both S. Blum & Company, the mortgagee under the mortgage, and S. O. Breedman, the lessee under the lease, were satisfied with a lease from J. A. Fagerberg, recognizing him as the sole owner of the property, and we may justly conclude that business men in transactions of the importance of this kind and involving such considerable amounts of money would be sure to have all parties claiming any interest in the property sign an instrument of this character.

Another piece of evidence showing that there was no partnership are the notes given by Victor Olson to J. A. Fagerberg, and not to the alleged firm of "Fagerberg Bros.", for goods sold to Olson out of the Chititu store. Three promissory notes given to J. A. Fagerberg by Olson on this account were introduced in evidence (R. 238), but they were omitted

from the record for the sake of brevity by stipulation as shown on page 438 thereof, as follows:

“It is agreed that Plaintiff’s Exhibit ‘G’ consists of three promissory notes given by Victor Olson, payable to J. A. Fagerberg, dated July 8, 1909, for the aggregate sum of \$719.20, due in 120 days, six months and one year respectively, and that this statement be incorporated in the bill of exceptions in lieu of said exhibit.”

Now let us see what the knowledge of the Carstens Packing Company was as to the real relations of H. M. and J. A. Fagerberg. Carstens testified that he had been informed by J. A. Fagerberg himself that the two brothers were partners in their business in Alaska. Now, if the Carstens Packing Company, or Thomas Carstens, had such full and absolute knowledge at all times that the plaintiff and H. M. Fagerberg were partners, it is strange that they did not impart some of such information to their attorneys. Mr. Ritchie, one of the attorneys for the Company in its suit against J. A. Fagerberg, and one of the attorneys for the defendants here, explains how the mistake came to be made (R. 246-256). We do not doubt Mr. Ritchie’s testimony, and he testifies on page 255 of the record, that it is his opinion that the answer was drawn by Mr. Thomas R. Lyons, one of the attorneys for the defendants, after consultation with Mr. C. F. Wilt, another of the attorneys, and both attorneys for Carstens Packing Company. Mr. Carstens (page 331 of the record) testifies that Mr. Wilt has been the attorney for Carstens Packing Company for two years, and that being such attorney

is his only business. Mr. Ritchie believes that the first amended answer was drawn by Mr. Lyons after consultation with Mr. Wilt. It appears from the record that Mr. Wilt was in Alaska in the year 1914, shortly before or at the time the suit against J. A. Fagerberg was started (R. 331). It is, therefore, strange that Mr. Wilt should state in an amended answer prepared under his direction that the Carstens Packing Company (the real defendant here), did not know at the time of the institution of the suit against J. A. Fagerberg that he and H. M. Fagerberg were general partners. We call the Court's attention to the following lines from the fourth paragraph of the amended answer of defendants, as follows:

“That said action of the Carstens Packing Company against J. A. Fagerburg was filed by E. E. Ritchie, one of the attorneys for plaintiff therein, without full information regarding the same from said Carstens Packing Company; that said Ritchie drew and verified the complaint upon the facts as they had been hurriedly communicated to him, and he was not aware that H. M. Fagerburg was a partner of J. A. Fagerberg in all dealings of said J. A. Fagerberg with the Carstens Packing Company; that when the amended answer was filed by said Ritchie in this cause, setting up that said Carstens Packing Company had learned since the filing of said company's case against J. A. Fagerberg that J. A. Fagerberg and H. M. Fagerberg were partners the same *was done on information written to said Ritchie by a Seattle attorney of said Carstens Packing Company.*” (Italics are ours.)

It is true that several answers do not appear word for word in the transcript, they were purposely omitted so as to make a smaller record. The sub-

stance appears, however, from the fourth paragraph of the amended answer a part of which is quoted above, and is found on pages 8 and 9 of the record. In Mr. Ritchie's cross-examination the matter is gone into quite extensively, and it is clear from that just what was pleaded in these different answers, as follows: (R. 254) (R. 277-278).

“Q. Who drew the original amended answer which was filed in the case now on trial?

A. I did.

Q. In the first answer you claim that the property is the property of the firm of Fagerberg Brothers, comprising J. A. Fagerberg and H. M. Fagerberg, do you not?

A. That is true.

Q. Now, the purposes of this cross-examination go further than the testimony just offered in reply to the allegations in that amended answer that Judge Lyons of Seattle sent up to you. Did he not have an allegation in that answer that he did not know of the alleged co-partnership between the Fagerberg Brothers at the time of bringing the suit of the Carstens Packing Company against J. A. Fagerberg?

A. I am not sure but there was probably something like that—I modified the answer in several particulars.” (Testimony of E. E. Ritchie for defendant—Recalled). (R. 277-278).

E. E. RITCHIE—(Recalled) (By JUDGE LYONS)

“Q. When you left the witness stand yesterday the understanding was that you were to produce any written instructions you had from either Mr. Wilt or Mr. Bunnell concerning the bringing of this suit entitled Carstens Packing Company against J. A. Fagerberg. I will ask you if you have any of those letters and if so, produce them.

A. Yes, I found a letter written to me by

Mr. Bunnell at Cordova. This is a long letter of five or six pages and there are some private matters in it, strictly confidential, on our side of the case, and on every page and I couldn't introduce that letter.

MR. DONOHUE. We have no desire that any part of the letter be introduced but if the letter is introduced, we want a chance to see that it covers every portion of this suit.

THE COURT. What is the purpose of the letter at all, what difference does it make?

MR. DONOHUE. I don't know that it makes any material difference, but the question came up; there is a contradiction in the two answers filed by the defendant in this case. In the first instance they alleged that when this property was attached, it was in the possession of J. A. Fagerberg, and H. M. Fagerberg if in possession of it was there as the agent or employe of J. A. Fagerberg; in the second amended answer they allege it was partnership property and that the Carstens Packing Company had no knowledge of the existence of the alleged co-partnership between J. A. and H. M. Fagerberg until after they filed the suit and had the writ of attachment issued. Now, Mr. Ritchie went on the stand yesterday and explained how that allegation came in that amended answer and said, I believe, that he was instructed by Mr. Wilt to (250-232) bring the suit against Fagerberg Brothers, but contrary to those instructions, he thought it safer to bring it against J. A. Fagerberg and that accounted for the way the suit was brought."

Also the following from the testimony of Thomas Carstens: (R. 332).

"Q. I see the Carstens Packing Company has filed an amendment to its answer in the case of H. M. Fagerberg vs. the United States Mar-

shal of the Third Division, in substance as follows: That at the time of the commencement of said action of Carstens Packing Company vs. J. A. Fagerberg, the plaintiff in said action was not aware that the plaintiff herein, H. M. Fagerberg and J. A. Fagerberg, were partners. How do you explain that in your answer, that you did not know they were partners up to July 31, 1914?

A. I know I told Mr. Wilt to bring suit against the brothers, as I stated before. I don't know why he sued J. A. alone. Mr. Wilt is not in town, he is in the East, and I did not know until today that the suit was brought in the name of J. A. Fagerberg alone."

It seems quite strange for the counsel for the plaintiff that Mr. Wilt, whose sole business was to look after the affairs of the Carstens Packing Company and who was on the ground shortly before bringing the suit against J. A. Fagerberg, should instruct Mr. Lyons to draw an answer containing the allegation that at the date of the bringing of the suit against J. A. Fagerberg, and at the date of the attachment in question, the Carstens Packing Company, of which he was an authorized agent, did not know of any alleged partnership relations existing between the plaintiff and J. A. Fagerberg. If he had any such information he kept it to himself and instructed Mr. Ritchie to draw an amended answer alleging want of knowledge of any partnership. Counsel for the defendants express amazement at the ingenuousness and trustfulness and general simplicity of the plaintiff Fagerberg, but they fail to express any surprise as to the lack of information of their attorney, Mr. Wilt, who undoubtedly knew all of the facts of the case as witness the following testimony of

the plaintiff (R. 243).

(Testimony of H. M. Fagerberg for Plaintiff—
Recalled)

“H. M. FAGERBERG, recalled for further
redirect examination.

(Questions by MR. DIMOND.)

Q. You stated either yesterday or this morning that you had a short conversation or several short conversations, I have forgotten which, with Mr. C. F. Wilt, the attorney for the Carstens Packing Company in July. I think it was, 1914, while he was at Blackburn?

A. I did, yes sir.

Q. Will you state whether or not you told him that you owned the property for which this suit is brought?

A. I certainly did.

Q. Did you show him the bill of sale for that property?

A. I did.

THE COURT. When was this, what date.

A. July, 1914.”

For a thorough understanding of the knowledge of the Carstens Packing Company of the relations of the plaintiff and J. A. Fagerberg, let us turn to the testimony of Thomas Carstens, the President of the Company. He testifies that he knew of the partnership at all times, but that he did all business with J. A. Fagerberg. He carried the account in the name of J. A. Fagerberg, he sued J. A. Fagerberg alone in Seattle and obtained judgment against him there and that he always looked to J. A. Fagerberg alone for payment (R. 330-1) (R. 333).

“Q. During all these years you knew that J. A. Fagerberg and H. M. Fagerberg were partners in Alaska?

A. From what J. A. told me.

Q. Now, notwithstanding that, you carried the account in the name of J. A. Fagerberg?

A. Yes, sir.

Q. Notwithstanding that you sued J. A. Fagerberg for an indebtedness that he owed, and secured a judgment?

A. Yes, sir.

Q. And he did not include H. M. Fagerberg?

A. No.

Q. And you looked personally to J. A. for payment?

A. Yes, sir.

Q. And did not look to Fagerberg Brothers, in advancing this credit, but, knowing that Harry Fagerberg was connected with J. A. Fagerberg, the bills were made out in the name of J. A. Fagerberg, and you did not look to H. M. Fagerberg or the alleged (294-276) partnership for payment but to J. A. Fagerberg?

A. To J. A. Fagerberg.

* * * * *

Q. Did you not know that J. A. Fagerberg had executed a bill of sale to H. M. Fagerberg the year previous?

A. I am not sure that J. A. made a bill of sale to his brother of the Chititu store or his business.

Q. Do you not remember that in the spring of 1913 J. A. Fagerberg wanted to make a bill of sale, of what he termed the whole works, to Carstens Packing Company, or to you?

A. Yes.

Q. Was not the condition of making such a bill of sale that the Carstens Packing Company was to pay the back salary of \$4,500.00 to H. M. Fagerberg? (296-278).

A. Not that I know of.

Q. What were the conditions that J. A. Fagerberg offered to make that bill of sale for?

A. I do not recollect. I do remember that there was some consideration he wanted to make his brother, in order to get him to turn it all back.

Q. But when he offered to deed it to you or the Carstens Packing Company, what were the conditions?

A. I don't remember just now, but I remember there was an amount he wanted to pay his brother, in order to leave his brother out of the transaction and turn the property over to me.

Q. Now, he was ready to turn the property over to you if you would pay his brother a certain amount of money, is that right?

A. I believe that is it.

Q. And you refused?

A. I believe I did.

Q. And that is the reason he did not make the bill of sale at that time?

A. It was something that came up—I don't remember.

Q. But you remember his making such a demand?

A. I believe there was something like that."

We thus see that at least seven months before the indebtedness on which Carstens sued J. A. Fagerberg was incurred he had full knowledge that all the property was conveyed to the plaintiff.

Now compare this last testimony of Thomas Carstens with that of J. A. Fagerberg of the same incident (R. 169-170-171):

"Q. And at the time of arriving at Seattle did you have any conversation with the officers of the Carstens Packing Company in regard to the claim of H. M. Fagerberg for wages?

A. Yes, sir.

Q. With whom did you have such conversation?

A. W. H. Prater.

Q. Who was he?

A. Secretary and Treasurer for the Carstens Packing Company.

Q. Just state the conversation you had with W. E. Prater in regard to that matter?

A. I told Mr. Prater the trouble I had been having up here and he says, it is the same old story, we have always had that up there—referring back to the old Myers outfit—and I told him what I wanted to do.

Q. What did you tell him you wanted to do in regard to H. M. Fagerberg's account for back wages?

A. I told him I wanted him to take care of that and I would give the Carstens Packing Company—if he would take care of H. M. Fagerberg's account, H. M. Fagerberg's wages, and the rest of the liabilities, I would give the Carstens Packing Company a transfer of the property, all the property I had control of in Alaska.

Q. Is that the same property that appears in the bill of sale that you did give H. M. Fagerberg in July, 1913?

A. Yes, sir. (157-140.)

Q. What did Mr. Prater say in regard to that?

A. He said he wouldn't have anything to do with it, I could do just as I liked.

Q. Did you have any talk about that time with any other officer of the Carstens Packing Company?

A. No, he wanted me to go over and see Tom Carstens about it.

Q. Where did Tom Carstens live?

A. His office is in Tacoma, the plant.

Q. Did you go and see Tom Carstens about it?

A. I did.

Q. Did you have any conversation with him?

A. I did.

Q. State the conversation you had with Tom Carstens?

A. I told Mr. Carstens the proposition as I told Mr. Prater. I told him, you take care of Harry's back wages and look out for the rest of the creditors and I will give you a transfer of the property and will call it quit.

Q. What did Mr. Carstens say about it?

A. He said, "No, I don't want anything to do with it; we will just take our loss and you can do as you like."

Q. What did you tell him you were going to do with the property then?

A. I told him when I went out that I would give Harry the property."

The Court will note that Mr. Carstens in his direct examination (R. 321) stated that J. A. Fagerberg was willing to turn his property over to the latter as Fagerberg was having trouble with his wife. In his cross-examination above quoted (R. 333) he states that J. A. Fagerberg offered to turn the property over on consideration of his giving something to the plaintiff herein, and this last statement absolutely corresponds with the statement of J. A. Fagerberg, just above quoted, of such conversation, that he was willing to turn the property over to Carstens if the latter would take care of the plaintiff's wage account and of the other creditors, and the answer he quotes of Thomas Carstens under the circumstances has the ring of truth: "No, I don't want anything to do with it; we will just take our loss and you can do as you like. (R 171). Mr. Carstens on his own testimony as well as the testimony of J. A. Fagerberg,

was at that time willing to relinquish all rights rather than have to pay any more money to the plaintiff or any one else. At that time he impliedly admitted the validity of the plaintiff's claim, thus proving that he had no thought of claiming a partnership between J. A. Fagerberg and the plaintiff. It was only a later date, and after the filing of the amended answer in this case, that it occurred to him to claim that the plaintiff and J. A. Fagerberg were general partners, and thus justify his lawless acts in attaching the property of the plaintiff under a writ against J. A. Fagerberg.

Mr. Prater also testifies (R. 307) that J. A. Fagerberg agreed to make a deed and bill of sale of all the property in Alaska to Thomas Carstens to liquidate some old indebtedness, and apparently he does not remember that the conditions on which the property was to be given to Mr. Carstens were that Mr. Carstens was to pay a certain sum to the plaintiff. The sole purpose, according to this witness, and according, likewise, to Mr. Carstens on his direct examination, of the transfer of the property to H. M. Fagerberg was to defeat the creditors of J. A. Fagerberg. It was only on cross-examination that Mr. Carstens remembered the one condition with which he refused to comply was the payment of a certain sum, the amount of which he also fails to remember, to the plaintiff. However, he is quite sure that it was not \$4,500.00 (R. 333).

We think there can be little doubt in any fair mind after reading this testimony that in the summer of 1913 the Carstens Packing Company and

Thomas Carstens were willing to pocket their losses in Alaska rather than invest another dollar. That they then and at all times knew J. A. Fagerberg and H. M. Fagerberg were not partners, and that the plaintiff could subject the property of J. A. Fagerberg to his wage account.

Before we pass from the question of the alleged partnership between the plaintiff and J. A. Fagerberg and the knowledge that the Carstens people had of it we desire to call the Court's attention to another piece of mute evidence in the case tending to support the first amended answer of the defendants, wherein they allege that at the time of the attachment of the property and at the time of the bringing of the suit against J. A. Fagerberg in 1914, they had no knowledge that the brothers were partners, and that is the proof of claim filed in the bankruptcy court in the bankruptcy of J. A. Fagerberg (R. 245). It will be noted that in the whole claim there is no mention of a partnership or of any partnership liability. The claim is made against J. A. Fagerberg alone. This was sworn to by Thomas Carstens on the 7th day of October, 1914, a date some considerable time after the time of the attachment. Counsel for the defendants say that since both the Fagerbergs owed the sum therein named, therefore each owed it, and it was no admission concerning the partnership to file a claim in bankruptcy against J. A. Fagerberg alone. It seems strange that Carstens should allege in this claim, if he at all times thought the brothers were partners, that the claim was for goods, wares and

merchandise converted by the bankrupt J. A. Fagerberg to his own use, and make no mention of the alleged partnership. This is in line with his practice of charging everything on his books to J. A. Fagerberg, looking to J. A. Fagerberg alone for payment (R. 330), bringing suit and recovering judgment against J. A. Fagerberg alone in Seattle, bringing suit against the same individual in Alaska, and not against any alleged partnership, and his testimony that the reason J. A. Fagerberg would not make the transfer of the property to him was because he would not put up money to pay the plaintiff his account. So much for the partnership, and the knowledge that the Carstens Packing Company had of it. We think it quite clear from the testimony of the plaintiff and J. A. Fagerberg, from the documentary evidence in the case and from the pleadings and from the admission of Thomas Carstens himself, not only that the plaintiff and his brother were not partners, but that Carstens Packing Company and Thomas Carstens at all times knew that they were not partners, and therefore that no estoppel is raised against plaintiff under the doctrine of *Thompson vs. First National Bank of Toledo, supra*, to deny the partnership.

There is a passage in the testimony of Thomas Carstens which somewhat strains the credulity of counsel for the plaintiff to believe. Mr. Carstens testifies that shortly before J. A. Fagerberg left for Alaska in the spring of 1914, he positively refused to let Fagerberg have any credit of any kind except about \$200.00 worth of meats, but that afterwards

Fagerberg drew upon him for \$1500.00, which he paid, and that he later advanced about \$2800.00 worth of supplies of various kinds, a total of about \$4300.00 (R. 327-328). It seems to us much more likely that the story of J. A. Fagerberg is true, that he went to Alaska in the spring of 1914 with a general understanding with Carstens that he was to obtain the property in question from the plaintiff, and that Carstens would stand behind him in his venture, in order to reap the profit then obtainable in the roadhouse and merchandise and general freighting business on account of the reported Shushanna strike (R. 172-3-4).

“Q. Did you shortly after that have any other or further conversation with Tom Carstens, the President of the Carstens Packing Company?

A. Yes, sir; I did.

Q. When?

A. I was away out of the city, and they started to hunt me up and then they sent for me and I came back from Everett and Prater and myself and Custer went to Tacoma and we had a conversation then and they wanted me to go back to Alaska on account of the Shushanna strike.

Q. Whom did you have the conversation with when you went to Tacoma?

A. Mr. Carstens.

Q. Was Mr. Prater present?

A. Yes, sir.

Q. Did Mr. Carstens state to you at that time why he sent for you?

A. Yes, he stated the Shushanna strike is now on and it looks as if we would be able to do something with that, and I want you to go up there and get the property back from Harry and

see if you can do something with it and get our money back out of it.

Q. Did he state why he thought there was a chance to get the money (159-142)?

A. Because of the Shushanna stampede—he was very much excited about it that time.

Q. When did the news reach Seattle about the Shushanna strike?

A. Along about the 20th of July, I judge, 1913.

Q. Just describe to the jury the location of the Shushanna mining district, with reference to the Blackburn roadhouse—what advantages there are to the roadhouse?

A. The Blackburn roadhouse is situated at the end of the Copper River and Northwestern Railroad. It is a distributing point for the head of the White, Chitina, Nizina, and all the tributary country; it is the natural gateway, the same as Valdez is to the Copper River country; and that was my argument with the company in putting in the Blackburn place.

Q. Then, as I understand you, people going to the Shushanna, get off the Copper River Railroad at Blackburn or McCarthy?

A. Yes, sir.

Q. And it is a case of mushing from there into the Shushanna?

A. Yes, sir.

Q. Now, what kind of a proposition, if any, did Mr. Thomas Carstens make to you in that conversation early in August, 1913, in which he wanted you to come back up here and get Harry Fagerberg to transfer the property back to you or to him?

A. "Well," he says, "You go up there and get the property back and I will give you anything you want." He went so far as to pay my transportation,—“and I will take care of all your back alimony,” etc., if I would go and straighten it out; he says, “You are the only one who can straighten it out.”

Q. Was anything said in that conversation about H. M. Fagerberg's back wages, or what interest he should have (160-143) ?

A. Well, there was nothing definite said at that very time except do the best you can—he always did—and I demanded a letter from him giving me instructions what to do.”

Now, on the question of veracity it seems to us that the preponderance of the mute testimony in the case is in the favor of the plaintiff, and it seems more likely that the allegation of the first amended answer of the defendants is true,—that is, that the Carstens Packing Company and its officers did not know at the time of the bringing of the suit against J. A. Fagerberg that he and the plaintiff had ever been held out in any manner as partners, but that afterwards learning of it they deemed it an unparalleled opportunity to take advantage of the ignorance of plaintiff and to take all of the property for which he had labored so many years. Truly, some people can bear with equanimity the misfortunes of their friends.

And right here it may be well to advert for a moment to the general business relations of the Carstens outfit and the plaintiff and J. A. Fagerberg. It appears in the record that an inventory was taken in 1907 of the stock of merchandise belonging to the Old Nizina Trading Company, or to Thomas Carstens, and that the same inventoried, at the prices then charged, about \$30,000.00 (R. 137), and a part of the cross-examination of both the plaintiff and J. A. Fagerberg was taken up with the question of what disposition was made of this considerable amount of property. But the plaintiff testified that

these prices were reduced all through about 33 1-3 per cent (R. 142). This would leave about \$20,000.00. About \$10,000.00 worth of merchandise was actually sold between 1907 and 1910, but of this \$10,000.00 a good part consisted of new goods which were taken in by J. A. Fagerberg during these years, as he put in the store between 1907 and 1910 about \$6,600.00 worth of merchandise (R. 159-160). A large part of the merchandise was thrown away, having become unsalable with age, particularly the groceries and meats (R. 142-143), and the remainder was still there at the time of the trial of the cause, except for quite a large amount which was given out on grubstakes under the directions and with the approval of Mr. Carstens (R. 162). We think that this testimony shows that this property was fairly used by J. A. Fagerberg for the purposes and disposed in the manner testified to, and that the Carstens Packing Company were like so many others in Alaska, taking great chances of loss in the hope of great profits, and reaped a loss only on account of conditions over which no human being had control.

Defendants also express surprise that all this valuable property was to be sold for \$7,000.00 by the plaintiff, a sum less than the rentals for a year, assuming that it could be leased for an entire year at the prices named in the lease of March 23, 1914. In the first place, we deem that the court will take judicial notice that property values in Alaska, except in a very few places, are much more highly speculative than in the United States proper. The plaintiff also

explained why he was willing to take this sum for the property (R. 145).

“Q. At the time you made this lease to him as you have testified, you expected that it would last only a short time?

A. I didn't expect it would last over two months at the very most.

Q. Why was it that this property that was worth about \$10,000.00, why were you willing to sell for \$7,000.00?

A. I was willing because I wanted to go outside. I had a proposition from my father. He has considerable real estate around Seattle, and he said if I could get a little cash money and come out there, he would back me outside, and I wanted to get out and let Al and Carstens conduct it themselves (R. 145).

* * * * *

Q. What I am getting at is— you owned this roadhouse and everything in it was a very profitable business, and you owned the horses, and you figured out you could make good money—a good many hundred dollars per month from them—and yet you leased everything to Al Fagerberg and turned in and worked for him for \$100.00 per month according to this agreement?

A. Yes, sir.

Q. Was that getting out of the country?

A. No, sir.

Q. Why did you do that?

A. In the first place that was only supposed to run for about a month before the incorporation was to be perfected, and that was to be turned over to them; that was not to be run for any length of time; that was the understanding when I turned that over to him and they were to go ahead and carry this thing, in fact, my brother telegraphed for a man to Carstens and they (88-71) sent him up, but they didn't send the man he wanted; he was to get out and perfect

the organization before I turned it over to him; I was to turn it over to him after the incorporation" (R. 93-94).

Remembering then the speculative value of the property, it is not so strange that the plaintiff would rather feel \$7,000.000 in real money in his hands than keep the property with all the labor entailed in making it a paying proposition. Most people do not care to live in Alaska all their lives, even though the living here may be made profitable by means of hard labor.

In all the various ramifications of the business of J. A. Fagerberg, Carstens Packing Company, Thomas Carstens, and such connection as the plaintiff had with them, it is to be borne in mind that the plaintiff and J. A. Fagerberg are brothers, and therefore that the degree of trust imposed by the plaintiff in his older brother is not so surprising in view of such relationship. A confidence which might be suspicious if testified to as existing between others, is the natural and ordinary thing between men bound by such ties of close relationship. Note the following testimony of the plaintiff (R. 139).

Q. Do you wish to be understood as saying, when you had at least (128-111) that amount due you as wages, you turned it over to Al who had never paid you anything but your board, and went to work for him in the logging camp and building a roadhouse, still went to work for him and gave him back the \$3,800.00?

A. I looked at it in this light: he came at it in this way and perhaps you can understand things. He says, "I put you in here," at the time we had a kind of a rumpus—"You were broke," he says, "and I put you in here and gave you a chance to make this money, and now" he says,

“when you have made this money and there is a chance to make money—this has been a losing proposition,” he says to me—“you draw out, take your money,” he says, “and leave me in the lurch with Carstens and the whole thing on my hands—you take your money and go off.” When a man comes at you that way, what are you going to do?”

This passage is not only illuminating, but we submit that it bears the stamp of truth on its face. It is entirely characteristic of that class of men, so plentiful in the North, where generosity outruns their reason and whose chief characteristic is a fervent and unfounded expectation of sudden and great riches.

Also note the following from the testimony of J. A. Fagerberg (R. 194).

“Q. Did you concede at that time that the \$3,800 was due him?”

A. Yes, sir; I conceded that the \$3,800 was due him; I concluded the \$3,800 was due the boy and I think a little more.

Q. How did you persuade him to give it up to you?

A. I said to him, “I put you in here and I am up against it on the proposition,” but I told him the advantages of the thing, and the points of the argument, and I said, “the property is worth it; any time I fall down you have the house here, when I put in the house—you can’t lose any way, even if the Carstens Packing Company give you the dirty end of it.”

Moreover, it is only reasonable to assume that the plaintiff may well have believed he was safe so long as the property was in existence and close at hand so that it could by proper legal proceedings at any time be subjected to his claim for wages

Counsel for the defendants observe in their brief that it is strange that the plaintiff was willing to work for the Carstens Packing Company for so long a time since, as plaintiff alleges, the name of that Company in Alaska was not good. We call the Court's attention to the testimony of Mr. Prater, the Secretary and Treasurer of the company, who admits (R. 286-287) that the Chititu property was given to J. A. Fagerberg, "Just for the purpose of him operating the store, and so as to change the name of the store in the eyes of the public." It is strange that they themselves wanted the name of the business changed.

Counsel for the defendants further advert at some length on the lease to J. A. Fagerberg from H. M. Fagerberg in the month of March, 1914 (R. 40-41-42), as to the fact that the property, at the rate mentioned in the lease would have brought in \$9,900 per year. In the first place we call the Court's attention to the fact that of that sum \$600.00 per month, or \$7,200.00 per year was for the ten head of horses, which left \$2,700.00 per year for all the other property, not much more than the sum for which the property was leased to Breedman (R. 34) and it will be noted that the Chititu store was not included in the lease to Breedman. It will be observed that this lease was by its terms to run for six months.

Both J. A. Fagerberg and the plaintiff testified that the best business was in the late summer and fall, Counsel's argument, though extremely plausible on its face, will not, under the facts, bear a searching

analysis. Assuming, as is stated on page 24 of the brief of counsel for the defendants, that there was an agreement to lease property which plaintiff claimed to be worth \$10,000.00 for \$9,900.00 per year, provided the lease at the figures named in the lease (R. 40-41-42) could have been obtained for the whole year, we must remember that the plaintiff valued the horses taken in the attachment, five of them at \$200 per head (R. 49). Assuming that the price mentioned represented the value of the remainder of those ten horses leased to J. A. Fagerberg, then the value of those ten horses would have been \$2,000.00. For the use of these horses plaintiff was to receive \$2.00 per day per head, or \$600.00 per month, and for the six months that these horses were leased to J. A. Fagerberg, at the rate mentioned, they would bring in \$3,600.00, something more than their value, but not at all strange in view of the conditions, when, in the midst of a stampede to new gold diggings, horses might be worth any price, and the \$2.00 per day charged by the plaintiff was never even questioned as reasonable. We believe that the Court will take, in a manner, judicial notice that the conditions in Alaska are different than in well-settled and old communities, where property values are firmer, and there is less wild speculation. Moreover, as sustaining the reasonableness of the rent value of horses at \$2.00 per day the plaintiff testifies that on a previous occasion (R. 123-124) he was obliged to pay \$3.00 per day per horse for nine horses for an entire summer and until late in the fall. If this value was not

reasonable, it seems to us that it devolved on the defendants to show its unreasonableness by the testimony of others under no suspicion of bias, but this they never even attempted.

Now, as to the other property: Deducting from the total value of \$10,000.00 the sum of \$2,000.00, the value of the horses, and we have \$8,000.00 remaining, and on this \$8,000.00 worth of property the plaintiff was, under the terms of his agreement with J. A. Fagerberg, to receive \$225.00 per month, or \$2,700.00 per year, surely not an abnormally large income for property valued at \$8,000.00, in view of the conditions prevalent in Alaska, and exactly the same rental received for the same property under the lease to Breedman, as the Chititu store was not included in that lease. To show the speculative nature of the value of the property we may cite the testimony of the plaintiff (R. 130) that Breedman's partner, Church, stated that he had cleaned up \$10,000.00 on the property during the time it was leased to Breedman between November, 1912, and March, 1914. And it appears by the record that the plaintiff, like most other men owning property of like nature, was always ready to discount the value considerably to get some real money. For instance, in making up the valuations, a price was put upon the Chititu store of \$2,000.00, which the plaintiff in the summer of 1914 offered to sell to Carstens for \$500.00 (R. 146), stating that he could use that sum to better advantage. Moreover, the plaintiff in making a proposition to sell the property to his brother for

\$7,000.00, was undoubtedly influenced by the ties of relationship.

Let us consider the manner in which the attachment of the property in question was actually made. The plaintiff testifies to the manner thereof on pages 45, 46 and 47 of the record, and we have quoted it on pp. 3 and 4 of this brief. This shows clearly that at the time of the attachment the plaintiff was in actual possession of the property claiming the same as his own, and that he was forcibly removed from the road-house and all of the property was taken from him by actual force. The marshal, the defendant Millsap, went into the possession of all the property and excluded the plaintiff therefrom. We desire in connection with this undisputed fact to call the Court's attention to the construction put upon our statute on attachment by the Supreme Court in the case *Marks vs. Shoup*, 181 U. S. 562, 45 L. Ed. 1002.

That was likewise a suit for damages on account of a wrongful attachment, the goods being at the time of the attachment in the possession of a person claiming them as his own, and who was not the defendant named in the writ of attachment. In that case as in this the marshal, Shoup, forcibly ejected such alleged owner from the building and took possession of all the property, and when suit was brought against him, alleged that the goods were in reality the property of the defendant named in the writ, and that the transfer to the claimant at the date of attachment was in fraud of creditors. The Supreme Court held this to be no defense, stating that under the attach-

ment statute in Alaska (identical with the statute now in force), if property is in the possession of a third person who claims it as his own, the only legal method of attaching it is by serving on such alleged owner a writ of garnishment, and that if the marshal takes forcible possession of the property he is a trespasser. In other words, the marshal has no right to determine for himself who is the lawful owner of the property, but under the garnishment proceedings the claimant has a chance to appear in court and establish his title.

Now, we cite this for two reasons: First, to show to the Court that the actions of the defendants in this case were absolutely contrary to the law, and any plea of partnership, or alleged partnership, was no defense in any event to our cause of action. Second, to call the court's attention again to the fact that the question of partnership has been decided by the jury in explicit terms. The Court will note that at the close of the trial the plaintiff moved for a directed verdict in his favor (R. 392) on the ground just mentioned—that the claim by the defendant that the plaintiff and J. A. Fagerberg were partners and that the property attached was partnership property—did not constitute any defense, basing his motion on the case of *Marks vs. Shoup, supra*. The record shows that after argument the motion was overruled. In this respect the transcript is incorrect, as counsel for the plaintiff who tried the case remember very clearly that they withdrew the motion in order to have the question of partnership, as well as all the other ques-

tions in the case, determined in the one action, and for that reason agreed in submitting to the jury, under stipulation with the defendants, a request for special findings on the question of partnership. The jury found as shown by the following (R. 413):

I.

“Was H. M. Fagerberg on the 6th day of August, 1914, the sole and lawful owner of the property described in the amended complaint, that is, the Blackburn roadhouse, furniture and equipment, the barns and outbuildings, and the horses, harnesses, sleds, etc., as set forth in Plaintiff’s Exhibit “A,” attached to the amended complaint?

He was.

II.

Was there a partnership existing between H. M. Fagerberg and J. A. Fagerberg at any time previous to the 6th day of August, 1914?

There was not.

III.

Should you find that there was such a partnership state when it began and when it terminated (370).

Dated at Valdez, Alaska, this 13th day of May, 1915.

GEORGE LACY,
Foreman.”

We believe that the counsel for the defendants will admit that we withdrew the motion for a directed verdict and that it was not over-ruled as stated in the record. If they will not, of course, the record must stand as it is and be taken for true, but in that event we submit that, under the decision of *Marks vs.*

Shoup, the ruling of the Court in this respect constituted reversible error. At all events it is a commentary on the general lawlessness of the Carstens Packing Company, for the Court will remember that according to the testimony of J. H. D. Bouse, the chief Deputy Marshal (R. 241-242) his office received instruction from the attorneys for Carstens Packing Company either to make the attachment, or to hold the property if it had already been attached, regardless of the claims of the plaintiff.

There remains now, of the questions seriously argued by the defendants, only the matter of damages on account of the attachment, the counsel for the defendants claiming that they should not stand as having been based on testimony of speculative profits. We have noted the contention of counsel on Page 34 of their brief, where they state that, as asserted at the trial of the case, the plaintiff is entitled to no damages because had the attachment not been made he would have gone on working for \$100.00 per month,—for how long a time counsel does not state,—and that, therefore, the only thing the plaintiff lost by the attachment was the chance of working for \$100.00 per month. In view of the undisputed facts, this is manifestly absurd. On the 2nd, 3rd and 4th days of August, 1914, the Marshal attached a large quantity of property belonging to J. A. Fagerberg of the value of \$5,800.00 (R. 182-184) and to which the plaintiff made no sort of claim.

After this first attachment of property that was undisputably J. A. Fagerberg's, that individual

turned over and delivered to the plaintiff all of the property which he theretofore had been holding under the lease of March 24 (R. 40-41-42), and the plaintiff held it until August 6, 1914, when it was forcibly taken away from him by the United States Marshal under the writ of attachment against J. A. Fagerberg. Now, we are not suing on account of the first attachment of J. A. Fagerberg's property, and have never laid claim to it. The only attachment of which we complain is the attachment of August 6, when all of the property claimed by the plaintiff was levied upon. Therefore, before the date of the attachment of which we complain the plaintiff was in undisputed possession of the property for which we sue, and was running the business as his own, and there is nothing in the record to show that, had it not been for the attachment of August 6, he would not have continued to hold and use it himself and make such profits, or incur such losses, as might accrue therefrom, and if he could prove any profits prevented he was certainly entitled to damages in that amount.

As to the amount of damages to which the plaintiff was entitled, it will be noted that the jury brought in a verdict for \$4725.00, which was reduced by the Court to \$3000.00, on the motion for a new trial, and the plaintiff consented in open court to such reduction. The order of the Court in this respect is as follows (R. 417-418):

"The motion of defendants for a new trial in the above-entitled cause came on regularly for hearing this 19th day of May, 1915, the plaintiff

being represented by his attorneys, Donohoe & Dimond, and the defendants by their attorneys, Lyons & Ritchie, and the Court having heard the said motion, and the arguments of counsel for the respective parties, and being fully advised in the premises, announced that in the opinion of the Court, the damages fixed by the jury in the verdict of four thousand seven hundred and twenty-five dollars for the wrongful taking and detention of the property described in plaintiff's amended complaint were excessive, and that in the opinion of the Court the sum of three thousand dollars would be just and equitable as such damages, whereupon, plaintiff announced in open court that he was willing to accept said sum of three thousand dollars as such damages.

Now, Therefore, It Is Ordered, That said motion for a new trial be and the same is hereby denied; and it is further ordered that the verdict of the jury as to damages for the wrongful taking and detention of the property described in the amended complaint in this action, be and the same is hereby modified by reducing the amount thereof from four thousand seven hundred twenty-five dollars to the sum of three thousand dollars, and that judgment be entered for plaintiff and against defendants and each of them accordingly. To which order of the Court the defendants then and there excepted (375).

Done in open court at Valdez, Alaska, this 19th day of May, 1915.

“FRED M. BROWN, *Judge.*”

So then we must consider not whether the verdict of the jury as entered for \$4,725.00, but whether the judgment of the Court for \$3,000.00, as such damages, was justified by the evidence and if it be found that the judgment of \$3,000.00 is sustained by the evidence then this Court would not be justified in reversing the

judgment, even if testimony was improperly admitted as to damages which alone would support the verdict of the jury in the larger sum. And we insist that there is plenty of material, competent and proper evidence in the record to justify that judgment.

In the first place, it is clearly established that the Blackburn property, exclusive of the horses, sleds and harness and certain other personal equipment, was leased to Breedman under a three-year contract for a monthly rental of \$200.00 per month, from and after November 20, 1912 (R. 34 *et seq.*), which lease, by agreement of the parties, was cancelled on or about March 1, 1914 (R. 38), a period embracing two winter seasons, when, by the testimony of the plaintiff and J. A. Fagerberg, and undisputed, the chances of making profits were smallest.

On March 24, 1914, the plaintiff leased the same property and some few sleds, harnesses and wagons to J. A. Fagerberg for \$200.00 per month for a period of six months (R. 41). The Court will note that the Chititu store was not included in the lease to Breedman or the lease to J. A. Fagerberg, and that it is not claimed by the plaintiff in this action, nor is it in any way involved here, and therefore may be disregarded. Here, then, was property that at the date of attachment, had been under lease since November 1, 1912, at the monthly rental of \$200.00 and we believe that this fact comes as close as any kind of testimony on earth could come to establishing the reasonable value of the property to plaintiff, as the reasonable profits prevented on account of the attachment.

Now, it appears from the record, both by the testimony of the plaintiff and by the return of the defendant Millsap to the writ of attachment, that the property in question was attached on August 6, 1914, and that the plaintiff never regained possession of any of the property previous to the date of the trial. The verdict of the jury at the trial was rendered on May 13, 1915, and judgment was rendered May 21, 1915, nine months and fifteen days after the date of the attachment. Calculating the usable value of the property at \$200.00 per month for that period would give exactly \$1900.00 as just measure of damages for the attachment of the roadhouse and adjacent property alone, leaving entirely out of consideration the usable value of the horses between the dates mentioned, during which the plaintiff was entirely deprived of their use. Now let us see the testimony of plaintiff on the question of the value of the horses (R. 57-58-59).

“Q. What profits were being made off the horses, off each horse, at the time the attachment was made?

A. Practically three dollars per day.

Q. How long did that business continue?

MR. RITCHIE. Before there are any more questions about the horses, I want him to tell what the horses were doing, who was handling them, and from what he derived compensation for those horses.

MR. DIMOND. Answer that.

THE WITNESS. I was handling them myself; they were doing a packing business to Chititu and Dan Creek.

Q. What were you packing over?

A. General freight and merchandise for Esterly and the Dan Creek Mining Company,

and different people over in that section of the country.

Q. How much did you charge a pound?

A. Seven cents, flat rate, to Esterly and the Dan Creek Mining Company.

Q. How much of a pack train were you running at that time?

A. I think I had eight horses.

Q. How many men did it take to handle them?

A. Myself, part of the time, once in a while, and Henderson.

A. How many men does it take to run a pack train of eight horses (54-37)?

A. Two men; one man can do it on a pinch.

Q. What is your average per pack horse over there?

A. 225 pounds.

Q. How long did it take to make a trip over to Chititu and Dan Creek and back?

A. She takes three days.

Q. In other words, every three days you take eight horses with 225 pounds each, that would be 2000 or 1800 pounds, rather, and you say you got for that seven cents per pound?

A. Yes, sir.

Q. That would be \$126.00. Now, what is the wages of those two men, what is the ordinary rate of wages in there?

A. \$100.00 per month. And, besides, we always pick up more or less packing coming back from the creeks that we usually get ten cents a pound for, bedding and blankets of the men and ferrying men across the river.

Q. The Nizina River has a ferry across it?

A. Yes, sir.

Q. Is it a bad river to ford?

A. Yes, sir.

Q. Did you have steady packing at the time the attachment was made?

A. Yes, sir; it was certainly steady packing; in fact the Marshal came to me and got my

permission and I gave my consent,—horses were so scarce and they were so hard up,—I hired the horses from the marshal, you might say, for \$3.00 per day,—that is what I was to get clear of them, that money is in the hands of the Marshal at the present time.

Q. That was after the attachment?

A. That was after the attachment; the horses were so scarce and it had to be done before any arrangements could be made (55-58) with other parties to take the packing. Breedman has done the packing since, during those months.

Q. What months do you refer to?

A. August, September and October.

Q. All of October?

A. The biggest part of October.

Q. Up to the 20th, anyway?

A. Yes, up to the 20th, anyway.”

Previous to the date of the attachment and during almost the entire spring and summer of the year 1914, J. A. Fagerberg had possession of the horses as bailee for hire at the rental of \$2.00 per day. Five horses were attached. This would give a net return on them per month of \$300.00. Now the plaintiff gave full and ample testimony as to the conditions in and around Blackburn at the time of the attachment and for the remainder of the summer and fall of 1914, and he stated that after the attachment was made horses were so scarce in the country, and the packing business was so great, that in order to relieve the congestion he consented that the Marshal let the horses out of his possession for the purpose of doing some packing for the Kennecott Company at \$3.00 per day apiece (R. 59-61).

“Q. Did you have steady packing at the time the attachment was made?

A. Yes, sir; it was certainly steady packing; in fact the Marshal came to me and got my permission and I gave my consent,—horses were so scarce and they were so hard up,—I hired the horses from the Marshal, you might say, for \$3.00 per day,—that is what I was to get clear of them; that money is in the hands of the Marshal at the present time (R. 59).

* * * * *

COURT. What were these horses doing that they couldn't work the same as they did packing in the summer?

A. They were tied up in the hands of the Marshal.

Q. How did they become untied, so that they were able to do this packing?

A. There was a bond put up by Mr. Seagraves; Mr. Seagraves stood good for it, the Kennecott Mines Company.

Q. Where are the horses now?

A. They were sold (R. 61).

It appears without any contradiction from the testimony of the plaintiff, and without any objection to the introduction of the testimony on the part of the opposing counsel that there was steady packing to Chititu and Dan Creek at the time of the attachment, and that such business would have continued and did continue until the latter part of October, 1914. Calculating, then, for a run of three and one-half months of business, which is amply supported by the testimony, between August 6 and October 20, at \$2.00 per day per horse, the price at which they were under bailment to J. A. Fagerberg, would amount to \$750.00. But the plaintiff testified that he was making a profit of \$3.00 per day per horse and that the business would have continued and did con-

tinue until October 20, and this testimony is supported by the fact that the horses were given by the Marshal to the Kennecott Mines Company at the same rate. The usable value of the horses at this rate for the time mentioned, that is, between August 6 and October 20, would give \$1125.00, and this sum added to the rental value of the roadhouse and adjacent property which was valued at \$1900.00, would make a total of \$3025.00. This would not take into consideration in any manner the possible profits that the plaintiff could have made out of any other timber contracts whatsoever, other than the business contracted for and the reasonable value of the use of the roadhouse property for the period which it was detained from plaintiff under and on account of the attachment, at the same rate at which it had been previously rented for nearly two years. And it is not improbable that the Court in reducing the damages found by the jury in the sum of \$4725.00 to \$3000.00, had in mind the value of the horses and other property as shown by the testimony to which we have just called the Court's attention. They are as certain as any human thing can be; and aside from some extraordinary calamities he would surely, as shown by the evidence, have made \$3,000.00 out of the use of the property in question between the date of the attachment and the date of the judgment without taking into consideration the usable value of the horses after October 20, 1914.

We call the Court's attention to the paragraph quoted by counsel for the defendants of the case of

Williams vs. Island City, 37 Pac. 49, on page 42 of their brief. As it is set out fully there we shall not repeat it. But we submit that our evidence fully sustains the doctrine therein laid down. "The measure of damages is the average value of the use of the business." Now, it is conclusively proved that the average value of the use of the roadhouse from November 1, 1912, until August 6, 1914, was \$200.00 per month, and this is "ascertained and determined by past experience." Under this doctrine, so far as the value of the use of the roadhouse is concerned, there can no doubt. Mr. Sedgwick says that the "evidence of actual past profits must be admissible." The past profits were \$200.00 per month, and this would make \$1900.00 for the period between the date of the attachment and the date of judgment, for the roadhouse alone, not reckoning the value of the horses. And with the horses the case is almost the same for the testimony shows that at the time of the attachment the plaintiff was clearing \$3.00 per day on each horse (R. 57). And that there was sufficient business in sight to keep the horses working until October 20, 1914.

Counsel for the defendants show some amazement over the fact that the plaintiff and his brother made no money out of the business previous to the year 1914, since, as they claimed, there was considerable money to be made in that year, but we think this is sufficiently and clearly explained by the testimony of both that on account of the Chisana stampede there was a great rush of business, and the fol-

lowing from the testimony of the plaintiff under cross-examination (R. 124-125) :

“Q. If the freighting business is so profitable up there, how does it happen that you haven’t anything more to show for all these years you have been working up there?

A. As I say, this business is worked up. Put in this way, the business is getting to a point—we put in many years to work up that business to that point—it is getting to be where it is worth some money and capable of offering some money through the efforts of the past—that is sifting it down to a fine point. You can realize yourself that any business on the start has to be worked up to a certain point, before it is capable to earn that money.”

And under the testimony there can be no question that the best business is in the late summer and fall, from and after the date of the attachment on August 6.

We have noted carefully, the cases cited to the Court on the proper measure of damages, and to one of which we have hereinabove adverted. As to the case of *Fidelity Company vs. Bucki Company*, 189 U. S. 135-142, we submit that it is not in point, as the Court held that the damages did not arise from the attachment alone, but rather from the cancellation of a contract with the Bucki Company and the bringing of suits against it. Neither is the case of *Cincinnati Gas Company vs. Western Siemens Company*, 152 U. S. 200, applicable, as a cursory examination of it will show, as the damages claimed there were on account of a breach of contract, as is the case with *Howard vs. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199-206. These

last two cases denied the admission of testimony as to profits prevented as a measure of damages, not alone on the ground that such damages under the testimony offered in each case was speculative but

“(2) because such loss of profits is ordinarily remote, and not the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms.”

Howard vs. Stillwell & Bierce Mfg. Co., supra.

We submit that in the case at bar the profits prevented by the attachment were not remote, as they were the natural and necessary result of a total interruption of the business of the plaintiff; nor were they speculative as they were based on actual past profits shown for a long time preceding the date of the attachment, to the amount of \$1900.00 in the case of the roadhouse, and packing business then known to be in hand for more than the balance of the \$3000.00.

But the rigidity of the old rule as to profits prevented being not a proper measure of damages is gradually being broken down. The Courts now rather are inclined to believe that it is as well to put some of the burdens on the wrongdoer, and that where one person deliberately acts in violation of the law in attaching the goods of another and thus putting him out of business, the one who commits the wrong will not be permitted to escape liability on the ground that, inasmuch as the other person is out of business

and consequently is unable to state just what his profits would have been, therefore no damages whatever may be recovered. It is coming to be good law,—as well as equity,—in cases of this kind, not to permit the wrongdoer to escape all liability for his lawless acts because his victim, by reason of those very acts, is placed in a position where he cannot exactly show just how much he has been damaged.

A case absolutely and directly in point is:

Kyd, Sheriff, et al. vs. Cook, 76 N. W. 524;

an action against a sheriff on account of a wrongful attachment, wherein the appellee, Cook, was plaintiff and Kyd, defendant. It appeared that the plaintiff was conducting a furniture and undertaking business and the whole business was attached by the Sheriff under a writ against another. The business was closed for ten days, and all the goods in the amount of \$6,000.00 were held for a period of three months. The Court expressly held that the loss of credit and the loss of profits was a fair measure of his damages, saying:

“Another argument is that loss of credit was not a proper element of Cook’s damages; that this element was too remote and speculative for consideration. This is simply saying that the wrongful destruction or injury of a merchant’s credit is one for which the law affords no redress. We cannot subscribe to this doctrine. A man’s financial standing or credit may not be ‘property’ within the technical meaning of that term, but it is something often more valuable; and, if it be wrongfully injured or destroyed by another, he may recover whatever pecuniary damages he can prove, by competent testimony,

under proper pleadings, he has sustained thereby.

Meyer vs. Fagan, 34 Neb. 185; 51 N. W. 753.

Lewis vs. Taylor (Tex. Civ. App.) 24 S. W. 92.

Hangen vs. Hachemeister (N. Y. App.) 21 N. E. 1046.

Haverly vs. Elliott, 39 Neb. 201, 57 N. W. 1010.

* * * * *

Another contention under this heading is that the District Court erred in admitting in evidence the proofs offered by Cook to show the loss of profits sustained by him in consequence of the attachment and removal of his goods, and the locking up of his store. The store was absolutely closed from the 23rd of October for ten days. The attached goods, comprising nearly all his stock, were held by the Sheriff from the time they were attached for some three months. The Court permitted Cook to show the amount of sales and the profits made by him in this business during the corresponding period of the previous year (that is, from October in one year until January of the next), as a basis for estimating his loss of profits; that by reason of the attachment of his goods, and the knowledge thereof that had been bruited abroad, he was unable to purchase goods on credit from persons with whom he had been previously dealing, in order to carry on the business. We think this testimony was all competent. It furnished a reasonably safe basis for determining whether Cook had been deprived of profits by this attachment proceeding, and the amount of such profits. The measure of Cook's damage was all the loss he had sustained as the result of this wrongful attachment. If the goods, when returned, were worth less than when they were seized, the amount of that depreciation was one element of damages. If Cook's reputation and credit as a merchant were injured by this wrongful attachment, this

injury was another element of his damages. If, by reason of the locking up of his store and the attachment of his goods, Cook's business was interrupted, and he was thereby deprived of profits which he would have made had the business not been interrupted, this loss of profits was another element of his damages; and, if the plaintiffs in error cannot be made to respond to Cook for all the damages which he sustained as the result of this wrongful attachment, it is not because of the fact that under the law Cook is not entitled to these damages, but because of the inability of the rule for their admeasurement.

Schile vs. Brokhahus, 80 N. Y. 614.

Goebel vs. Hough (Minn.) 2 N. W. 847.

Shepard vs. Gaslight Co. 15 Wis. 318.

Schars vs. Barnd, 27 Neb. 94, 42 N. W. 906.

Haverly vs. Elliott, 39 Neb. 201, 57 N. W. 1010.

Telegraph Co. vs. Wilhelm, 48 Neb. 910-67 N. W. 870.

“Counsel for plaintiffs in error criticize somewhat the doctrine of this Court making loss of profits in cases like the one at bar an element of damages. We think, however, the doctrine is a just and reasonable one, and one enforced by the courts generally. We think that a loss of profits is a result which may be reasonably, naturally and ordinarily expected to follow from the closing up of a merchant's place of business, and the seizure of his goods; and where an officer, holding a writ of attachment directed against A. and his property, closes up the place of business and seizes the goods in the possession of, and claimed to be owned by, B., when called upon to make good B.'s damages he ought not to complain because the Court includes in such damages the loss of profits sustained by B. because of the seizure of his goods and the interruption of his business.”

Another well-considered case is that of *Welling-*

ton vs. Spencer, (Okl.) 132 Pac. 675, in which damages were claimed and recovered on account of a wrongful attachment, the Court saying:

“The next question presented is whether the closing of the hotel building and consequent destruction of plaintiff’s business was an element of damage to which he was entitled. The decisions upon this question are not uniform. A number of cases hold that no recovery can be had for loss of profits. However, not many late cases can be found supporting that proposition. A number of cases hold that no recovery for loss of profits occasioned by the destruction of business can be had unless the act which occasioned the loss was malicious.”

Kaufman vs. Armstrong, 74 Tex. 65, 11 S. W. 1048.

Bucki Lumber Co. vs. Maryland Fidelity Co., 109 Fed. 393, 48 O. C. A. 436.

Union Natl. Bank vs. Cross, 100 Wis. 174, 75 N. W. 992.

Braundorf vs. Fellner, 76 Wis. 1, 45 N. W. 95.

But a large number of well considered cases held that when the loss of profits is the approximate result of the unlawful act, and the amount is capable of proof to a reasonable certainty, the earnings of a business may be taken into consideration when assessing damages for the unlawful act.

Smith vs. Eubanks, 72 Ga. 280.

Stewart vs. Lanier House Co., 75 Ga. 582.

Chapman vs. Kirby, 49 Ill. 211.

Lawrence vs. Hagerman, 56 Ill. 68, 8 Am. Rep. 674.

Dobbins vs. Diquid, 65 Ill. 464.

Terra Haute vs. Hudnut, 112 Ind. 542, 13 N. E. 686.

Moore vs. Schultz, 31 Md. 418.

Lawson vs. Price, 45 Md. 123.

Evans vs. Murphy, 87 Md. 498, 40 Atl. 109.
Goebel vs. Hough, 26 Minn. 252, 2 N. W. 163.
See Sedgwick on Damages, 173 *et seq.*

* * * * *

In *Lambert vs. Haskell*, 80 Cal. 611, 22 Pac. 327, the Court said: 'It is objected that the respondent was allowed to recover damages for the profits which he would have made had he not been prevented by the injunction from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade. If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained could be inquired into. The best considered cases agree, that, where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissible.'

Terre Haute vs. Hudnut, 120 Ind. 550 *et seq.*
 (13 N. E. 686.)

Chapman vs. Kirby, 49 Ill. 219.

Simmons vs. Brown, 5 R. I. 299, 73 Am. Dec. 66.

Gibson vs. Fischer, 68 Iowa 30 (25 N. W. 914)

Goebel vs. Hough, 26 Minn. 256 (2 N. W. 163)

Shafer vs. Wilson, 44 Md. 268.

In the case of *Chapman vs. Kirby*, 49 Ill. 211,

the Court said: 'As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well founded objection. We all know that in many, if not all, professions and callings, years of effort, skill, and toil are necessary to establish a profitable business, and that when established it is worth more than capital. Can it be said that a party deprived of it has no remedy and can recover nothing for its loss, when produced by another? It has long been well recognized law that, when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimated, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained with a reasonable degree of certainty.'

We thus see that only a *reasonable* certainty is required, and is not that absolute proof necessary to sustain many claims in law.

The same doctrine was laid down in the case of *Fort Smith & Western R. Co. vs. Williams*, 121 Pac.

275. This was a suit for damages arising out of breach of contract for the shipment of certain machinery, but the case is applicable for the reason that the Court held that the loss of profits in that case was the proximate result of the non-fulfillment of the contract by the defendant, and that on account of the notice the defendant had of the use to which the machinery was to be put, and the necessity of the contract being performed on time, such loss must have been contemplated in the contract, and thus eliminating the second and third of the reasons for denying the admission of the testimony of possible profits as a measure of damages as set forth in *Howard vs. Stillwell & Bierce Mfg. Co.*, 139 U. S., 199, hereinbefore quoted on page 51 of this brief. In this case the machinery was a merry-go-round to be used at a certain picnic which lasted two days. The defendant agreed to have the machinery on the ground in time for its erection and use during the whole period which the picnic lasted, naming specific dates. The outfit did not arrive until the expiration of the first day of the picnic and could not be erected until between 9:00 and 10:00 o'clock the following day and the last day of the picnic. The following quotation from the case (page 278) shows the nature of the evidence presented and considered sufficient for the court as a foundation for damages in the sum of \$200.00.

“The record further discloses that the number of people present on the first day was, if any difference, greater than on the second day. It showed, also, that the plaintiff, after getting his machinery ready for operation, at about ten

o'clock the second day, from about ten o'clock in the morning of the second day to the close of the evening of the same day, took in \$245.00. The plaintiff claimed that he lost \$400.00 by reason of not having his machinery ready as he agreed upon. He testified that he would have taken in \$400.00 more had he had his machinery ready for operation during the whole of the two days. This testimony, of course, was a mere supposition, and not to be treated as a basis upon which to compute the amount of damages. But the fact that he took in \$245.00 during a little more than two-thirds of the second day, and the witness Jorden, who operated the machine and who had been operating merry-go-rounds for seven years, testifying that the net profits of the time lost on the second day would have been at least \$40.00, reckoning from what had been taken in during the remaining portion of the day, and the fact that the crowd was larger, if any difference, on the first day than on the second, it appears to be reasonable that under ordinary circumstances he would have taken in \$200.00, the amount of the judgment, during the one and one-third days lost to him. The record shows there were 2,500 to 3,000 people present each day; that there was no other merry-go-round on the grounds; that a run lasted three to four minutes. This, it seems to us, would offer a reasonable basis upon which to estimate an approximate loss. It is not unreasonable to suppose that the receipts would have been approximately the same on the first as on the last day. Had he been able to run all of the second day at the same rates which he did run, his receipts would have been from \$325.00 to \$360.00. Hence we do not feel that it would be unreasonable for the jury to say from all the facts before them that defendant was damaged at least \$200.00 for the one and one-third days lost. I would appear more unreasonable and conjectural and more out of harmony with business experience and common judgment to say

that he would not. And in view of all the circumstances we think the verdict is not the result of mere guesswork or conjecture, but that it is fair, reasonable and should be allowed to stand. The judgment is therefore affirmed."

The following cases also are in point on the question of the admission of evidence as to profits prevented as a measure of damages:

Tootle vs. Kent, 73 Pac. 310,
and
West vs. Martin, 97 Pac. 1102.

In considering this phase of the case, then, it is necessary to take into consideration all of the circumstances surrounding the case: The situation of the property, the length of time the roadhouse had been operated, the Chisana stampede, the great rush of business at the time of the year at which the attachment was made and for several months thereafter, the fact that the plaintiff owned a saw-mill at which he had profitable use for the horses during winter, and even the permanent loss of business to the roadhouse on account of its being closed nine months and the transfer of the business usually done by it to another small town about one mile distant, as testified to by plaintiff, under cross-examination, to some extent (R. 125).

The fact that no profits were made out of the business previous to the year 1913, should not be a criterion by which to measure the profits possible to be made in the years 1913 and 1914. We suppose that if a merchant had operated a store and pack train at the mouth of the Klondyke River for ten years pre-

vicious to 1897 he probably would not have made great profits, but in case all his property was wrongfully attached in the spring of 1898, with thousands of people pouring into the camp, and thousands of tons of freight to be taken in and horses worth almost their weight in gold, the fact that he had made no profits during the previous years ought not to be a bar to his recovery of damages by showing profits prevented by such a wrongful attachment. The same reasoning will apply to this case. Blackburn was constructed almost in a wilderness, and outside of the trade and travel superinduced by the construction of the railroad there would have been no business. The record shows that it was completed in the spring of 1911. It was rented in the fall of 1912 for \$200.00 per month, and was under continuous lease at that figure almost until the date of the attachment. So far as the freighting business is concerned it too had to grow and was growing with the development of the country.

We shall revert briefly to the assignments of error (R. 440 *et seq.*) the first of which is:

“The Court erred in admitting in evidence over the objection of defendants, Plaintiff’s Exhibit “D”, which purported to be a contract between Thomas Carstens and J. A. Fagerberg on the one part and H. M. Fagerberg on the part; it being conceded by plaintiff and by his witness, J. A. Fagerberg, that said contract was signed only by J. A. Fagerberg and H. M. Fagerberg, the name of Thomas Carstens being appended thereto by J. A. Fagerberg without his knowledge; the same purporting to be a contract for a partnership among said parties and ultimate in-

corporation.”

That this was not error appears clearly from the instruction of the Court to the jury at the time Plaintiff's Exhibit “D” was admitted, as follows (R. 42):

“BY THE COURT. At this time the jury will be instructed that the only purpose for which this exhibit “D” which has been introduced and read to the jury is admitted in evidence is to determine and relative to the question of ownership of this property as between J. A. Fagerberg and H. M. Fagerberg and so far as the name of Carstens appear in it, you will not consider that at all unless it further be shown by the evidence in this case that there was authority given by Mr. Carstens to enter into this agreement or to sign his name to any such paper; that so far as the recital in there that Carstens has entered into an agreement with J. A. Fagerberg is concerned, you will disregard that until it is shown by some competent evidence here that Mr. Carstens authorized such an arrangement. The only effect of this paper just read to you is, so far as it may aid you in determining whether J. A. Fagerberg or H. M. Fagerberg was the owner of this property.”

The first paragraph of the second assignment of error relates to the admissibility of evidence as to what the defendants call speculative profits. This has already been covered. The second paragraph of the second assignment of error is predicated upon an untruth, for as we have before pointed out at the time of the attachment of the property sought to be recovered in this action the plaintiff was in possession of it and claiming it as his own, and we care nothing about the previous attachments of J. A. Fagerberg's property.

The third assignment of error is as follows:

“The Court erred in refusing to give part of instruction No. 5 asked by defendants as follows: “You are instructed that possession of property is presumptive evidence of ownership, until the basis of ownership is otherwise explained, and long continuance in possession strengthens the presumption of ownership. In this case if you find that the Blackburn roadhouse and equipment had been in possession of J. A. Fagerberg most of the time since it was constructed, and that H. M. Fagerberg never had charge of it for a considerable length of time you are entitled to consider the facts regarding possession as making a *prima facie* case of ownership in J. A. Fagerberg.”

The instruction asked for has no application to the undisputed facts of the case, and the giving of the instruction could not have been in any manner helpful to the defendants. The plaintiff admits the ownership of J. A. Fagerberg in all of the property until July, 1913, which certainly is “most of the time” since the roadhouse was constructed. Besides it is contrary to the theory of partnership between the plaintiff and J. A. Fagerberg on which the case was tried. The asking for this instruction was a reversion by the defendants to their first amended answer wherein they stated that at the time of the attachment they knew of no alleged partnership between the plaintiff and J. A. Fagerberg.

The fourth assignment of error is based upon the Court’s denying the defendant’s motion for a new trial, and the fifth, upon the Court’s entry of judgment in favor of the plaintiff and against the defendants. These matters have been covered in the pre-

ceding argument.

Now, as we have stated, the plaintiff in this action as well as the defendants submitted to the jury the question of the partnership under request for special findings thereon, and the jury found that there was no partnership between the plaintiff and J. A. Fagerberg. And the plaintiff insists that under the undisputed testimony in the case as to the manner of making the attachment, the defense of partnership never lawfully could have gone to the jury except for plaintiff's consent thereto. The jury found that the plaintiff was entitled to damages in the sum of \$4725.00, but the Court, deeming this amount too high, reduced the sum to \$3,000.00, stating that "*in the opinion of the Court the sum of three thousand dollars would be just and equitable as damages.*"

The Court and the jury heard all the evidence, viewed the witnesses on the stand, and were better able than this Court to judge the truthfulness of their testimony. And we shall not cite any authority to the Court to sustain the proposition that the findings of Courts and juries that try cases and hear all the testimony are not lightly set aside, even though the Appellate Court might come to a different conclusion from the same testimony. And this case, we submit, is entirely a question of fact. Counsel for the defendants cannot point to an error of law during the trial which would for an instant commend itself to the mind of this Court. The question of partnership was passed upon by the jury and found in favor of the plaintiff. The question of damages was

passed upon by both the jury and the Court, and found in favor of plaintiff in the sum of \$3000.00. The plaintiff has had no more than justice, and the judgment should stand.

Respectfully submitted,

T. C. WEST and
DONOHUE & DIMOND,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNION FISH COMPANY, a Corporation,
Appellant,

vs.

JOHN W. ERICKSON,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

MAR 3 - 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNION FISH COMPANY, a Corporation,
Appellant,
vs.
JOHN W. ERICKSON,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, First Division.

CLERK'S OFFICE.

No. 15,706.

JOHN W. ERICKSON,

vs.

UNION FISH COMPANY.

Praeceptum [for Apostles on Appeal].

To the Clerk of said Court:

Sir: Please *issue* prepare the Apostles on appeal in the above cause, to consist of:

All the pleadings, with the exhibits annexed thereto.

All the testimony, and other proofs adduced in the cause.

All opinions of the Court.

The final decree, and the notice of appeal; and,

The assignments of error.

H. W. HUTTON,

Proctor for Respondent.

[Endorsed]: Filed Oct. 15, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libellant,

vs.

UNION FISH COMPANY,

Respondent.

(Additional Praecept for Apostles on Appeal.)

To the Clerk of the Above-entitled Court.

In addition to the matters contained in the praecipe for the apostles on appeal in the above cause filed with you to-day:

Please insert in said apostles the matters required by Sec. (1) of the rules in Admiralty, United States Circuit Court of Appeals for the Ninth Circuit, adopted May 21, 1900.

Yours, etc.,

H. W. HUTTON,

Proctor for Respondent and Appellant.

[Endorsed]: Filed Oct. 16, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [2]

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 15,706.

JOHN W. ERICKSEN,

Libelant,

vs.

UNION FISH COMPANY, a Corporation,

Respondent. [3]

Statement of Clerk, U. S. District Court.

PARTIES.

Libelant: JOHN W. ERICKSEN.

Respondent: UNION FISH COMPANY, a Corpora-
tion.

PROCTORS

for

Libelant: F. R. WALL, Esquire, San Francisco, Cali-
fornia.

Respondent: H. W. HUTTON, Esquire, San Fran-
cisco, California.

PROCEEDINGS.

1914.

September 19. Filed verified Libel for breach of con-
tract of hiring.

Issued Citation for appearance of
Respondent which Citation was
afterwards, on September 22d,
1914, returned and filed with the
return of the U. S. Marshal en-
dorsed thereon as follows: [4]

“I hereby certify and return that I served the annexed Citation on the therein-named Union Fish Company, a corporation by handing to and leaving a true and correct copy thereof with John W. Pew, the President of said Union Fish Company, personally at San Francisco, Cal., in said District, on the 21st day of September, A. D. 1914.

J. B. HOLOHAN,
U. S. Marshal.

By C. B. Delaney,
Office Deputy.”

September 28. Filed Respondent's Exceptions to Libel.

October 3. This cause this day came on for hearing, upon Respondent's Exception to Libel, and after hearing duly had, the Court ordered that the matter stand submitted.

22. The Court this day rendered a written opinion, in which it was ordered that Respondent's Exceptions to Libel be overruled.

31. Filed Stipulation and Order that a Commission issue, directed to F. C. Driffield, United States Commissioner at Unga, Alaska, authorizing him to take the testi-

mony of R. Hoelke and N. J. Uldall.

November 2. Filed Answer.

9. Filed Libelant's Cross-interrogatories to be propounded to R. Hoelke and N. J. Uldall. [5]

December 12. Filed Amended Answer and Interrogatories propounded to Libelant.

17. Filed Answers of Libelant to Respondent's interrogatories.

Filed Libelant's Cross-interrogatories, to be propounded to R. Hoelke and N. J. Uldall.

23. Filed Respondent's Direct Interrogatories, to be propounded to R. Hoelke and N. J. Uldall.

24. Issued Commission, directed to F. C. Driffield, authorizing him to take the testimony of R. Hoelke and N. J. Uldall.

1915.

June

4. Filed Answers of R. Hoelke and N. J. Uldall to Direct and Cross-interrogatories, taken before U. S. Commissioner, Driffield, at Unga, Alaska.

15. Filed deposition of Sven William Wallstedt, taken before U. S. Commissioner, Krull, on behalf of Respondent.

16. This cause this day came on for hearing in the District Court of the United States, for the Northern District of California, at San Francisco, before the Honorable M. T. Dooling, Judge, and after hearing duly had, it was ordered that the matter stand submitted to Court for decision. [6]
- September 8. The Court this day rendered a written opinion, in which it was ordered that a decree be entered in favor of Libellant for the sum of \$716.05, with interest and costs.
10. Filed Final Decree.
20. Filed Notice of Appeal.
21. Filed Bond on Appeal in the aggregate sum of \$1250.00, with H. W. Hutton and John W. Pew, as sureties.
23. Filed one volume of testimony taken in open Court.
- October 18. Filed Assignment of Errors. [7]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY.—No. 15,706.

JOHN W. ERICKSEN,

Libellant,

vs.

UNION FISH COMPANY, a Corporation,

Respondent.

Libel for Breach of Contract of Hiring.

To the Honorable M. T. DOOLING, Judge of the
United States District Court, in and for the
Northern District of California, First Division:

The libel of John W. Ericksen, late master of the schooner "Martha," against the Union Fish Company, a Corporation, owner of said schooner, in a cause of breach of contract of hiring, civil and maritime, alleges and articulately propounds as follows:

1. That, as libelant is informed and believes and therefore alleges the truth to be, at all of the times herein mentioned, the respondent herein, the Union Fish Company, was, ever since has been, and still is, a corporation organized and existing under and by virtue of the laws of the state of California, with its principal place of business at San Francisco, in said State; that at all of said times said respondent was, ever since has been, and still is, the owner of that certain schooner or vessel known as and called the "Martha," a vessel of the United States.

2. That in the month of May, 1914, at said San Francisco, said respondent and said libelant entered into an oral contract or agreement of hiring wherein and whereby it was mutually agreed that said libelant was to proceed to Pirate Cove, Alaska, and after arrival there to serve the respondent as master of said schooner "Martha" for a period of not less than one year and also during said time to [8] assist the manager of said respondent's salting station at said Pirate Cove when possible to do so without interfer-

ing with libelant's duties as said master of said schooner; that it was further agreed by said respondent and said libelant that said libelant was, during said time, to receive for said services wages at the rate of \$55 a month and board and lodging for himself and his wife, and, at the end of not less than one year, transportation from said Pirate Cove to said San Francisco; that in accordance with said agreement, said libelant proceeded to said Pirate Cove, where he arrived on or about the 12th day of June, 1914, and thereupon entered upon the performance of his duties as aforesaid and continued to perform the same until the 18th day of July, 1914, when libelant was, by said respondent without fault on libelant's part, discharged from the services of said respondent, and libelant and his wife were thereupon by said respondent furnished with transportation from said Pirate Cove to said San Francisco; that said respondent has paid libelant the aforesaid wages at the rate of \$55 a month up to and including the 15th day of July, 1914, and furnished board and lodging to said libelant and his wife up to August 5, 1914, and for no further or other time; that on said 18th day of July, and at all times since then said libelant was and has been and still is ready, willing and able to perform his part of said contract of hiring; that because of the breach of said contract of hiring as aforesaid libelant has been damaged in a sum of not less than \$1,430, which sum he asks this court to award to him.

4. That all and singular the premises are true and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process may issue against said respondent Union Fish Company, in accordance with the rules and [9] practice of this court in admiralty, and that said respondent be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Court would be pleased to decree payment of the damages aforesaid, with interest and costs, and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

F. R. WALL,
Proctor for Libelant.

JOHN W. ERICKSEN,
Libelant.

Subscribed and sworn to before me this 19th day of Sept., 1914.

[Seal] LYLE S. MORRIS,
Deputy Clerk U. S. District Court, Northern District
of California.

[Endorsed]: Filed Sep. 19, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

[Exceptions to Libel.]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSON,

Libellant,

vs.

UNION FISH COMPANY, a Corporation,

Defendant.

To the Honorable M. T. DOOLING, Judge of the
First Division of the Above-entitled Court:

Exceptions taken by Union Fish Company, the defendant above named to the libel of the libellant herein, for the following causes, to wit:

I.

That said libel does not state any facts upon which libellant can obtain a recovery against defendant.

II.

That the alleged agreement of employment mentioned in said libel, is void under the provisions of subdivision 1 of section 1624 of the Civil Code of the State of California, and is also void under the laws of the United States of America.

III.

That the contract of employment alleged in said libel was terminable at any time at the will of this defendant.

WHEREFORE said defendant prays to be hence dismissed.

Respectfully,

H. W. HUTTON,
Proctor for Defendant.

[Endorsed]: Filed Sep. 28, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

**[Opinion and Order Overruling Exceptions to
[Libel.]**

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALITY—No. 15.706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

H. W. HUTTON, Esq., Proctor for Respondent.

F. R. WALL, Esq., Proctor for Libelant.

ON EXCEPTIONS TO LIBEL.

In a suit in Admiralty involving a contract so purely maritime as the hiring of the master of a vessel the Court will not be bound by the Statutes of Fraud or of Limitations of individual States; and while it is the general rule that an owner may discharge a master at will, this rule is subject to the qualification that he may not do so, if the master has been hired for a fixed term. The exceptions to

the libel are therefore overruled.

October 22d, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 22, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALITY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

Answer.

To the Honorable M. T. DOOLING, Judge of the
Above-entitled Court.

The answer of Union Fish Company, respondent
above named, respectfully shows as follows:

I.

It denies that libelant was hired by it to proceed
to Pirate Cove, in Alaska, and there work for a
period of not less than one year, and in that behalf
it alleges that no time of service was ever agreed
upon between libelant and respondent, excepting
only that it was agreed that libelant should work
for respondent only so long as it was mutually satis-
factory to libelant and respondent.

It denies that libelant was hired to assist the

manager of respondent at any time or place, but it admits that libelant was hired to work partly as master of said vessel "Martha," and partly on shore as the superintendent of respondent in Alaska might direct.

It denies that it was ever agreed between libelant and respondent that at the expiration of one year from the time libelant arrived at Pirate Cove, in Alaska, or that at the end of not less than a year, respondent agreed to furnish transportation for libelant and his wife from Pirate Cove, in Alaska, to San Francisco, in the State of California, it admits, however that respondent did agree to [13] furnish transportation for libelant and his wife from said Pirate Cove to said San Francisco whenever libelant's services might terminate in Alaska.

It denies that libelant ever entered upon the performance of service for respondent in Alaska as assistant to respondent's manager at Pirate Cove, in Alaska, or at any other place, it admits however that libelant worked as second mate on one of respondent's vessels from San Francisco, to said Pirate Cove and that at the last-mentioned place he worked for respondent as master of the vessel "Martha" and partly on shore in doing such work as he was called upon to do by respondent's superintendent in Alaska. And in that behalf respondent alleges that libelant's method of doing such work was unsatisfactory in this that libelant would not work proper hours and the hours of service usually worked in businesses of like character in Alaska, he was also careless in his work, and becoming dissatisfied with

his employment it was mutually agreed between himself and respondent's superintendent in Alaska, to wit, at said Pirate Cove therein, that libelant's service should end, and thereupon libelant left said Pirate Cove and was by respondent furnished with transportation with his wife therefrom to said San Francisco, at which place it was agreed between libelant and respondent that there was a balance owing said libelant of the sum of eighty-seven and 64/100 (87.64) dollars by said respondent, which was paid to him by said respondent on the 7th day August, 1914, which libelant received and accepted in full of all demands against respondent.

Respondent denies that by reason of any act or omission of its, or by reason of any breach of contract of hiring or by reason of anything else ever existing between libelant and respondent, that libelant has been damaged in the sum of \$1,430, or any *any* other sum, or has suffered any damage at all. [14]

II.

Respondent denies that the premises stated in the libel are true, except as they may be specially admitted herein, or admitted by reason of a failure to deny the same herein, and it denies that the matters stated in said libel are either *the* within the admiralty and maritime or admiralty or maritime jurisdiction of the United States of this Honorable Court.

WHEREFORE respondent prays that libelant take nothing by his action herein, but that the libel herein may be dismissed, and that it, said respondent, may have such other and further relief herein as

the Court is competent to give in the premises.

UNION FISH COMPANY,

Respondent.

By J. W. PEW,

President.

H. W. HUTTON,

Proctor for Respondent.

United States of America,

Northern District of California,—ss.

J. W. Pew, being first duly sworn, deposes and says as follows: I am an officer, to wit, the President of Union Fish Company, the respondent above named; I have read the foregoing answer and I know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

[Seal]

J. W. PEW.

Subscribed and sworn to before me this 31st day of October, 1914.

MARGUERITE S. BRUNER,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed] :, Filed Nov. 2, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

[Amended Answer and Interrogatories.]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALITY—No. 15.706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY, a Corporation,

Respondent.

To the Honorable M. T. DOOLING, Judge of the
Above-entitled Court:

The amended answer of Union Fish Company, respondent above named, filed by leave of the Court first had and obtained, respectfully shows as follows:

It denies that libelant was hired by it to proceed to Pirate Cove, in Alaska, or to any other place, and there work for it, this said respondent, for a period of not less than one year, and in that behalf it alleges that no period of service was ever agreed to between libelant and respondent.

It denies that it was ever mutually agreed between libelant and this said respondent that libelant should proceed to Pirate Cove, in Alaska, or anywhere else and there serve respondent as master of the schooner "Martha," and also to assist the manager of respondent at said Pirate Cove or anywhere else; it admits that libelant was hired for a time not specified to proceed to Pirate Cove, in Alaska, and there work for respondent as master of

the schooner "Martha," and when not so engaged to work on shore at said Pirate Cove as respondent's superintendent at said Pirate Cove might direct.
[16]

It denies that it was ever agreed between libelant and this respondent that libelant's wages while he was working for it the said respondent should be \$55 a month and board and lodging for himself and his wife; it admits, however, that libelant's wages were agreed upon as \$55 per month and board and lodging for himself only, but by permission of respondent libelant took his wife to Pirate Cove with him on one of respondent's vessels, but respondent denies that as a part of the consideration of libelant's employment by it, it ever agreed to furnish his said wife board or lodging.

It denies that it was ever agreed between libelant and respondent that at the expiration of not less than one year after libelant arrived at said Pirate Cove transportation should be furnished for libelant and his wife from Pirate Cove, in Alaska, to San Francisco, it admits, however, that it is the custom of respondent to furnish transportation for its employees and their wives and families working at said Pirate Cove to said San Francisco whenever the term of service of such employees ends.

It denies that libelant ever entered upon the performance of any duties for respondent at Pirate Cove, in Alaska, under the or any agreement mentioned in libelant's libel, or that he ever entered on any duties a part or any of which was to assist the manager of respondent at said Pirate Cove, or that

he ever entered upon any duties whatever at said Pirate Cove under and by which he was to serve respondent for a period of not less than one year at said place or under any agreement by which he was to serve said respondent for that period.

Respondent alleges that libelant was hired by it to proceed to said Pirate Cove, in Alaska, and there work for respondent partly as master of the schooner "Martha" and partly on shore; that no term of service was mentioned or agreed upon between libelant and respondent; [17] that pursuant to such agreement libelant shipped as second mate on one of libelant's vessels and proceed to said Pirate Cove, at which place he commenced to and did work for respondent partly as master of the schooner "Martha" and partly on shore; that while so working he would not work according to the customs of the business in which he was engaged, in this, that at said Pirate Cove there was at the time libelant so worked there and had been for many years prior to his doing such work a custom that men should commence work at such work as libelant did at five o'clock in the morning and continue to work as late in the evening as was necessary, the work respondent being engaged in at said place being the catching and salting of codfish, and at times late hours are necessary in such business, and it was also the custom at said place to work Sundays; that libelant was familiar with the custom when he was employed as he had worked in Alaska at the same business before; that libelant would not and did not commence to work while he was working under the employment

aforesaid at said Alaska before seven in the morning and he would not work on Sundays at all; that his method of doing work when he did do any was unsatisfactory in this, that he was slow, grumbled about the work he was asked to do, and at times would not work at all; that while at said Pirate Cove libelant demanded work of respondent at a station different to the station for which he was employed, he was careless in his work and dissatisfied with his employment, and thereupon he was discharged by libelant's superintendent at said Pirate Cove, to which discharge he assented, and an account was thereupon stated between libelant and respondent of all matters and things that existed between them, by which account a balance was shown to be due to the libelant from the respondent in amount the sum of \$87.64, which sum was paid to him by this respondent on the 7th day of August, 1914, and libelant received and accepted the same in full of all claims and demands against said respondent. [18]

That at the time libelant worked for respondent at said Pirate Cove, respondent had a large number of other men at work for it at said place, consisting of fishermen, fish splitters, salters and other men engaged in work incident to a codfish station and necessary in doing work thereat.

Respondent denies that by reason of any act or omission of its, or by reason of any breach of contract of hiring libelant by it, the said respondent, or by reason of anything else ever existing between the libelant and respondent, that libelant has been damaged in the sum of \$1430.00 or any other sum, or at

all, or has suffered any damage whatever.

Respondent denies that the premises stated in the libel are true, except as they may be specially admitted herein, or admitted by a failure to deny the same, and denies that the matters stated in said libel are either within the admiralty and maritime jurisdiction or the admiralty or maritime jurisdiction of the United States, or of this Honorable Court.

Wherefore respondent prays that libelant take nothing by this action, but that his libel may be dismissed, and that it may have such other and further relief as the Court is competent to give in the premises.

UNION FISH COMPANY,

Respondent.

By J. W. PEW.

H. W. HUTTON,

Proctor for Respondent.

United States of America,

Northern District of California,—ss.

J. W. Pew, being first duly sworn, deposes and says as follows:

I am an officer, to wit, the President of Union Fish Company, the respondent above named; I have read the foregoing amended answer and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief, [19] and as to those matters I believe it to be true.

J. W. PEW.

Subscribed and sworn to before me this 11th day of December, 1914.

[Seal] MARGUERITE S. BRUNER,
Notary Public in and for the City and County of
San Francisco, State of California.

**[Interrogatories Propounded to Libelant by
Respondent.]**

Interrogatories propounded to libelant by respondent and which he is required to answer under oath:

I.

Did you ever work in Alaska prior to the year 1914? If so state when and for who, and what you worked at.

II.

Who held the conversation with you when you were hired to work for respondent at the times mentioned in your libel?

III.

Where was such conversation held and who was present?

IV.

What was said?

V.

How many trips did you make as master of the "Martha"?

VI.

Give the dates you started on such trips, where they were to and to what places she went with you on board as master.

VII.

When you were not actually on the "Martha" as

master what work did you do at Pirate Cove? [20]

VIII.

How long did it take you to make a trip on the "Martha"?

IX.

How many men were working for the respondent at Pirate Cove while you were during 1914?

X.

Have you done any work since you returned to San Francisco, from Pirate Cove in August, 1914? If so, for whom have you worked, what work have you done, and how much have you earned?

XI.

Are you a citizen of the United States? If so, when and where did you become a citizen?

XII.

Who discharged you from respondent's service in Alaska, and what did he say when he discharged you?

XIII.

What did you say when you were discharged?

XIV.

Did you at any time ask to be transferred to another station in Alaska from Pirate Cove? If so, what station.

XV.

Are you familiar with the work necessary for filling a position in a codfish salting station? If so, state what experience you have had and when you gained such experience.

H. W. HUTTON,
Proctor for Respondent.

[Endorsed]: Filed Dec. 12, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSEN,

Libellant,

vs.

UNION FISH COMPANY, a Corporation,

Respondent.

Answers to Respondent's Interrogatories.

State of California,

City and County of San Francisco,—ss.

John W. Ericksen, being first sworn, deposes and says: That the following are his answers to the interrogatories propounded to him by the respondent in the above-entitled libel, at the end of said respondent's amended answer to said libel; that said answers of this affiant are numbered to correspond to the interrogatories of said respondent and are as follows, to wit:

I.

Yes. I first worked in Alaska in 1898, fishing for salmon in the Nushak for the Alaska Packer's Association. In 1900 I went up there sailor for the McCullom Fish Co., which afterwards, as I understand it, became the Union Fish Co., and fished for them about a year off and on, codfishing, dressing and

salting our own fish on shore and kenching or loading them in bulk on the schooner "Serena." I also helped during that time to build for the McCullom Co., a salting station at Eagle Harbor. In 1901, I fished for the Greenbaum Company around Unga, doing the same work as in 1900. In 1902, I fished for, salmon for the Whalers around Ketchikan. [22] In 1906, I fished for salmon for the Alaska Packer's Association in Naknek, and before the fishing season began, I helped discharge the vessels and to build warehouses, repair wharves, drive spiles for traps, launch lighters and do the work usually done by fishermen in Alaska, before fishing begins.

II.

Mr. C. P. Overton, the manager of the Union Fish Co., the company that I am suing.

III.

In May, 1914, while I was in command of and running the sloop "Union" about San Francisco Bay, for the Union Fish Co., I spoke to Mr. Cox, a clerk for the company, and asked him if the company had any station in Alaska where I could be station boss. He said he would speak to Mr. Overton. A day or two after that I went to the office of the Union Fish Co., at 41 Clay Street, in San Francisco, California, as I was in the habit of doing, for I went there nearly every day for orders. I was outside of the window or grating at the office of the company and Mr. Overton was inside of the office. There was nobody else there that I could see, except that Mr. Cox was in the office when I came to the window; but he went into another office as soon as the conversation began with

me and Mr. Overton. Mr. Cox came into the office where Mr. Overton and I were once or twice afterwards during our conversation, as I remember it, to get some papers or books or something and went right out again.

IV.

All that was said, as nearly as I can remember, although I don't claim to give the exact words or just the order things were said, was this: Mr. Overton first said to me, "I hear, Cap., you want to go up to Alaska." I said, "Yes, I would like to go. I'd like to get some station to be boss in, and fish at the same time, [23] if you want me to, being as I want to take my wife along with me up there." Then he said to me, "We haven't got no station; but there is a job to run the schooner 'Martha' as a skipper, if you would like to take that, at Pirate Cove. I will give you more wages, or you may call it more wages, than you are getting now. You will get your board and your wife's board and \$55 a month. I would like to have you go up there for at least a year, or longer if everything is all right, and when you get through with the job, of course, we will bring you back. You can help Hoelke the foreman, around the station when it doesn't interfere with your work with the 'Martha.' " I said, "What doing?" And he said, "Count fish and do whatever odd jobs there are." So I said, "I would have no expenses at all, then?" "No," he said, "everything will be furnished you, and there is a cottage up there you can live in." He then told me, "You go and consult with

your wife and let me know what she says.” I said, “All right,” and then went to a restaurant on the waterfront where I met my wife and we talked it over, and I saw Mr. Overton at the office later on that same day and told him, “My wife is willing to go all right and I will take the job.” He then said, “All right, you get ready to go on the ‘Golden State.’ ”

V.

Five.

VI.

I can't give the exact dates; but as nearly as I can remember she started on the first trip from Pirate Cove about June 16, 1914, for Sandburn, went there and returned to Pirate Cove, where she arrived the next day. Started from Pirate Cove on the second trip, about three days later for Porter Bay and went there and returned to Pirate Cove in three or four days. Started on the third trip three or four days after the end of the second trip and went first to Northwest Harbor and then to Siminoff, and then back to Pirate Cove, taking about five days. About three days after the third [24] trip started on the fourth trip which was from Pirate Cove to Sandburn, and return, and took about three days. The fifth trip began about a day after the fourth. It was also from Pirate Cove to Sandburn, and return, and took three or four days, I don't know exactly which.

VII.

All kinds of odd jobs, such as shingling roofs, packing codfish tongues, bundling up empty salt sacks, counting fish and keeping the “Martha” in condition for sea and shipshape.

XVIII.

This is answered in "VI," as near as I can answer it.

IX.

I don't know exactly; but between 30 and 40.

X.

My earnings since I arrived from Alaska have been: Schooner "C. T. Hill" longshoring, \$25.00; steamer "Strathdee," Pacific Stevedoring Co., in September, \$35.00; Mail Dock for "Woodside" longshoring, \$11.50; on the Grace dock for the California Stevedoring Co., steamer "Santa Clara" in October, \$36.00; California Stevedoring Co on Grace dock in October, \$12.00; for California Stevedoring Co. on the steamer "S. F. Dollar" in November, \$17.50; Grace dock in November, \$21.00. Total, \$158.00. During that time the house and board expenses for myself and wife have been \$220.00.

XI.

Yes. In 1912, at San Francisco, California.

XII.

Hoelke, the foreman of the Union Fish Company's station at Pirate Cove, Alaska. On July 18, 1914, as nearly as I can remember, Hoelke came over to my cottage and asked my wife if I was in. She told him that I was eating supper, and he said, "After he is through [25] tell him to come over to my office." I went over to the office after supper and Hoelke said to me, "You pack up to-morrow and go down on the 'Golden State'; I will make up your time and you can get it and look it over to-morrow."

XIII.

I said "All right."

XIV.

No.

XV.

Yes. I have already stated where and how I gained such experience in answer to Interrogatory No. "I."

JOHN W. ERICKSEN.

Subscribed and sworn to before me this 17th day of Dec., 1914.

[Seal] CHARLES EDELMAN,
Notary Public, in and for the City and County of
San Francisco, State of California.

My Commission expires April 7, 1918.

Received a copy of within answers of libelant to respondent's interrogatories this 17th day of December, 1918.

H. W. HUTTON,

Proctor for Respondent.

[Endorsed]: Filed Dec. 17, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [26]

**[Commission to Take Depositions of R. Hoelke
et al.]**

The President of the United States of America, to
F. C. Driffield, United States Commissioner,
Unga, Alaska, Greeting:

KNOW YE, That we, in confidence of your prudence and fidelity, have appointed you Commis-

sioner, and by these presents do give you full power and authority diligently to examine upon corporal oath or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed, R. Hoelke and N. J. Uldall, as witnesses on the part of the respondent in a certain cause now pending undetermined in the District Court of the United States, in and for the Northern District of California, First Division, wherein John W. Erickson is the libelant and Union Fish Company, a corporation, is the respondent.

And we do hereby require you F. C. Driffield before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal directed to the Clerk of the District Court of the United States, in and for the Northern District of California, First Division, at the city of San Francisco, State of California, as soon as may be convenient after the execution of this commission; and that you return the same, when executed, as above directed, with the title of the cause endorsed on the envelope of the commission.

WITNESS the Honorable M. T. DOOLING, Judge of the District Court of the United States of America, for the Northern District of California, this 24th day of December, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 139th.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [27]

**[Stipulation and Order for Issuance of Commission
to Take Depositions of R. Hoelke et al.]**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY, a Corporation,

Respondent.

It is hereby stipulated and agreed that a commission may issue out of and under the seal of the above-entitled court, directed to F. C. Driffield, a United States Commissioner, located at Unga, Alaska, authorizing him to there take the testimony in the above-entitled cause of R. Hoelke and N. J. Uldall, upon written interrogatories, the direct interrogatories on the part of respondent to be served upon proctor for libelant within three days after the making of an order by the above-entitled Court directing such commission to issue cross-interrogatories on behalf of libelant to be served within five days after the service of such direct interrogatories, and re-direct interrogatories to be served within two days after the service of such cross-interrogatories if respondent shall desire redirect interrogatories; the interrogatories may be settled by the judge of said court if either party desires such settlement.

Dated October 29th, 1914.

F. R. WALL,
Proctor for Libelant.

H. W. HUTTON,
Proctor for Respondent.

Let such Commission issue.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 31, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk [28]

[Interrogatories to be Propounded to R. Hoelke.]
*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

Interrogatories to be propounded to R. Hoelke, on
the taking of his deposition before F. C. Driffield,
Esq., United States Commissioner at Unga, Alaska.

I.

What is your name, age, occupation, and where do
you reside?

II.

Are you in the employ of the Union Fish Com-
pany? If so, how long have you been in its employ,

and at what place and in what capacity?

III.

If you state in response to the last interrogatory that you are manager or superintendent of respondent above named, please state how long you have been such manager or superintendent and if you have an assistant, and if so, how long your present assistant has held that position.

IV.

Do you know John W. Erickson, the libelant above named? If so, how long have you known him?

V.

Did libelant work at Pirate Cove, Alaska, during the months of June and July, 1914? If so, state for whom worked and under whose direction he was while doing such work. [29]

VI.

If you state in response to the last interrogatory that libelant worked at Pirate Cove, Alaska, during said months, please state what he was while working.

VII.

Did the libelant act as master of the vessel "Martha" in Alaska during the months above mentioned? If so, how much of his time was occupied on that vessel?

VIII.

Did libelant work on shore at Pirate Cove, Alaska, during the months above mentioned? If so, how much of the whole time he worked in Alaska did he work on shore, and what did he do?

IX.

What time do men start to work at Alaska, particularly in Pirate Cove, and what time has it been the custom to so start there for years past?

X.

What time did libelant start to work there?

XI.

What effect had the starting of libelant to work at the time he did on the other men at Pirate Cove?

XII.

Did you ever have any conversations with libelant about the time he started to work? If so, how many, when and what was said?

XIII.

What is the purpose of men starting to work at the time they do at Pirate Cove in Alaska?

XIV.

Did libelant obey your orders in Alaska? If you state that he did not, state in what particulars, and what, if anything, you said to him relative thereto?
[30]

XV.

State the circumstances under which libelant left the service of the Union Fish Company at Alaska, what you said to him relative thereto, and what he said to you.

XVI.

Was libelant competent to perform the services he attempted to perform at Pirate Cove? If not, state in what particulars he was not competent.

XVII.

Did you have any conversations with libelant rela-

tive to the manner of doing his work? If you state that you did, state how many, the time such conversations took place and what was said.

XVIII.

Was libelant able to perform the work required of him in Alaska by the Union Fish Company? If not, state in what particulars.

XIX.

State generally anything you may know relating to John W. Erickson, the libelant, and happening while he was in the employ of the Union Fish Company, although not specifically asked for in the foregoing interrogatories.

H. W. HUTTON,
Proctor for Respondent. [31]

[Interrogatories to be Propounded to N. J. Uldall.]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

Interrogatories to be propounded to N. J. Uldall, upon the taking of his deposition before F. C. Driffield, Esq., United States Commissioner at Unga, Alaska.

I.

What is your name, age, occupation, and where do you reside?

II.

If you state in response to the last interrogatory that you are working for the Union Fish Company, state where, how long you have so worked and in what capacity.

III.

Do you know John W. Erickson, the libelant herein? If you do, state how long you have known him, and where you first became acquainted with him.

IV.

Did libelant work at Pirate Cove, Alaska, while you have been there? If so, state what he did.

V.

Did he do any work on shore there? If so, state how much of the time he worked on shore, and what he did when he worked on shore.

VI.

Was libelant able to do the work required of him at Pirate Cove? If you state he was not, state in what particulars he was not. [32]

VII.

What hours of labor did the men employed at Pirate Cove by the respondent work during the time libelant was there?

VIII.

What hours of labor did libelant work while he was there?

IX.

Did you ever hear any conversations between libelant and R. Hoelke on the subject of the hours of labor libelant worked at Pirate Cove? If so, please state the conversations.

X.

Do you know from any conversations you ever heard in which libelant took part, why libelant left Pirate Cove for San Francisco? If you do, please give the conversations, or any conversations, relative thereto had in libelant's presence.

XI.

What was the general manner of libelant's performance of service at Pirate Cove? Please give full particulars.

XII.

Please state *and* matters that you know relative to libelant's work at Pirate Cove, his performance thereof, and how and the circumstances under which he left there, although not particularly called for in the foregoing interrogatories.

H. W. HUTTON,

Proctor for Respondent.

Copy received this 3d day of November, 1914.

F. R. WALL,

Proctor for Libelant.

[Endorsed]: Filed Dec. 23, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [33]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSEN,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

**Libelant's Cross-interrogatories upon Amended
Answer.**

Cross-interrogatories to be propounded to R. Hoelke, on the taking of his deposition before F. C. Driffield, Esq., United States Commissioner, at Unga, Alaska.

I.

Did N. J. Uldall succeed to Ericksen's job?

II.

Was N. J. Uldall the master of or did he act as master of the vessel "Martha" at any time, and if so what time, during the season of 1914?

III.

Did anyone other than Ericksen himself tell you in what capacity Ericksen was employed? If yes, who was it told you and when.

IV.

While libelant was working on shore, did he pack codfish tongues for shipment on any vessel at any time?

V.

Did you keep any memorandum or any written

account of the time that the libelant worked on shore? If you did, give such [34] memorandum or written account to the commissioner to be marked as an exhibit and to accompany your deposition.

VI.

If you kept no written memorandum or account of the time the libelant worked on shore, state whether or not you depend solely upon your memory for your statements as to the time libelant worked on shore?

VII.

How many men, persons, including yourself and the libelant, were working at the station of the Union Fish Company at Pirate Cove during the time the libelant was at Pirate Cove during the months of June and July, 1914?

VIII.

State in detail in what capacity the men employed at Pirate Cove during June and July, 1914, were employed.

IX.

How many men employed at Pirate Cove in June and July, 1914, were engaged in fishing?

X.

Is it not a fact that the men employed at Pirate Cove in June and July, 1914, and engaged in fishing, would start to work sometime between 4 and 5 o'clock in the morning?

XI.

At what time would the men employed at Pirate Cove in June and July, 1914, and engaged in fishing, start to work?

XII.

Is it not a fact that the men above referred to as

engaged in fishing would return from fishing usually before 10 o'clock A. M.? If not, what time did they usually return? [35]

XIII.

Is it not a fact that the fishermen above referred to depended for the compensation upon the number of fish they caught?

XIV.

Did you ever give the libelant any definite order or orders when he was so start to work? If you say you did, state fully when such orders were given and just what they were.

XV.

Did the libelant ever refuse to do any work that he was definitely ordered by you to do? If you say he did, state fully and particularly what the work was and when the order was given and what the libelant said.

XVI.

If you say that libelant was not competent to perform the services he attempted to perform, state whether or not you ever told the libelant that he was not competent to perform said services, and just what the services were.

XVII.

If you say the libelant was not able to perform the work required of him in Alaska by the Union Fish Company, state whether or not you ever told the libelant that he was not able to perform said work, when and where you told him, who was present and just what each of you said.

XVIII.

Did you not tell the libelant, soon after libelant arrived at Pirate Cove, that you did not want him or that you did not need him or something to the effect that his services were not needed or wanted?

XIX.

If you answer cross-interrogatory XVIII in the negative, state whether or not you had any conversation with libelant soon [36] after he first arrived in Pirate Cove regarding his services, and what, if anything, that conversation was.

XX.

Is it not a fact that the first time you ever ordered libelant to do anything was on the 17th or 18th of July, 1914, or just a day or two before he left Pirate Cove for San Francisco?

XXI.

Did you make any report, in the form of a letter or any other writing or orally, to the Union Fish Co., or to any of its officers or agents, of the circumstances attending the discharge of the libelant?

XXII.

If you answer question numbered XXI in the affirmative, give the commissioner a copy of the writing, if any, made by you, to be attached by him to your deposition as an exhibit.

F. R. WALL,
Proctor for Libelant. [37]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSEN,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

**Libelant's Cross-interrogatories [to be Propounded
to N. J. Uldall].**

Cross-interrogatories to be propounded to N. J. Uldall, upon the taking of his deposition before F. C. Driffield, Esq., United States Commission, at Unga, Alaska.

I.

Did you go up to Pirate Cove on the same vessel with the libelant?

II.

After you arrived at Pirate Cove, did you go away from there, and if yes, to what place?

III.

If you went away from Pirate Cove, when did you go and when did you return?

IV.

How much of the time from the time that libelant arrived at Pirate Cove in June until he left in July were you at Pirate Cove?

V.

What did you do at Pirate Cove while the libelant

was there and where did your work take you? [38]

VI.

Did you work with the libelant while the libelant was at work on shore at Pirate Cove, and if you did how many days did you work with him?

VII.

If you say the libelant was not able to do the work required of him at Pirate Cove, state whether or not you ever told the libelant he was not able to do such work.

VIII.

Was it any part of your business or duty to determine whether or not the libelant was able to do his work at Pirate Cove?

IX.

Did you succeed to any of the libelant's work or duties after the libelant left Pirate Cove for San Francisco?

X.

Are you a citizen of the United States?

XI.

Were you present in the mornings when and where libelant went to work?

XII.

Did you ever hear R. Hoelke say that he had not wanted or needed the services of the libelant or anything to that effect?

F. R. WALL,

Proctor for Libelant.

[Endorsed]: Filed Dec. 17, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk.

Received a copy of the within cross-interrogatories

upon amended answer to be propounded to R. Hoelke and N. J. Uldall.

H. W. HUTTON,
Proctor for Respondent. [39]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

Answers of R. Hoelke to Direct Interrogatories.

BE IT REMEMBERED that pursuant to the Commission hereunto annexed, and on the 1st day of March, 1915, in the Territory of Alaska, United States of America, before me, F. C. Driffield, a Commissioner of the United States of America in said Territory of Alaska, and the Commissioner appointed by the annexed Commission, personally appeared R. Hoelke, a witness produced on behalf of the Respondent in the above-entitled cause now pending in the above-entitled court, who, being by me first duly sworn, was then and there examined and his deposition taken in writing in answer to the interrogatories annexed to the said Commission, and he testified as follows:

I.

A. My name is R. Hoelke. My age is 51 years.

General Agent. I reside at Pirate Cove, Popoff Island, Alaska.

II.

A. I have been in the employ of the Union Fish Company for the past twenty-eight years, being employed on the various stations of said company in Alaska as a fisherman and as an agent, but have resided at Pirate Cove for the past sixteen years as General Agent, in full charge, of said company in Alaska. [40]

III.

A. I have been manager or general agent for the past sixteen years. I have never had an assistant.

IV.

A. Yes, I have known him for the past fourteen years.

V.

A. He worked at Pirate Cove, Alaska, during the month of June and up to about the 11th of July, 1914, when he sailed for San Francisco, Cal., on our schooner, the "Golden State." He worked for the Union Fish Company under my direction.

VI.

He was to be acting as captain of our small tender, the schooner "Martha," but when the vessel was not in use he was supposed to make himself generally useful about the station.

VII.

A. To the best of my knowledge the libelant only acted as master of the "Martha" for about twenty days during the months above mentioned.

VIII.

A. As nearly as I can now remember he only worked nine days ashore. It was general utility work, such as shingling, tying up empty sacks and sweeping out the different warehouses.

IX.

A. For the past twelve years the working hours at Pirate Cove and at other stations has been from 7 A. M. to 5 P. M. The men who go fishing generally go out about daybreak, but there are no set hours for this work.

X.

A. When ashore he did not start to work before 7 A. M., and many instances I had to call him after that time, as he did not turn too promptly. When he was in charge of the vessel, the "Martha," the hours were practically continuous. [41]

XI.

A. The only effect I could see on other men at Pirate Cove would be when the "Martha" was in the Cove and the libelant would not go aboard until as much as two hours late, during which time the men on the vessel would take advantage and lay around idle.

XII.

A. I had several conversations with him about turning to more promptly when ashore, also when his vessel was in the Cove that he would probably have to do tide-work. This he refused to do and also said that he would not work on Sundays.

XIII.

A. To get the best results.

XIV.

A. The only orders he did not obey was in the matter of getting to work on time. I asked him several times why he did not, and the only answer I got was that he did not come to Pirate Cove to work and would only do so when he was ready.

XV.

A. I discharged him for the reason that he refused to obey me regarding the working hours. I simply told him that I had to have someone who was more reliable and in whom I could put more trust. He never made any reply.

XVI.

A. I think he was perfectly competent to perform any duty asked of him while on shore, if he had only cared to use his best endeavors. In the matter of acting as master of the "Martha," I saw different facts which made me judge he was not competent in that position. Such as not knowing how to heave the vessel to, also when running before the wind he would keep the sheets in instead of having them slacked out. [42]

XVII.

A. The only conversation I had with him relative to the manner of doing his work ashore was in regard to the time of going to work, which occurred several times. In the manner of handling the vessel I had one occasion to tell him what to do, when I was going to give him a tow with my launch into the Cove, about 4 miles away. He was sailing along when I got up to him and told him to heave the vessel to while I passed a line on board. He did not seem

to know what to do until I told him.

XVIII.

A. I should judge he was physically able to do any work required of him, yet not competent to do so, as answered in Interrogatory XVI.

XIX.

A. One great fault with Mr. Erickson was that he would persist in wanting to take his wife with him when making a trip on the "Martha." This I refused to allow, but he would continue to argue the matter, and I think it undoubtedly created friction between him and the company. His wife was also with him wherever he was working, on the roof shingling or in the warehouses, undoubtedly detracting him from doing his work in a proper manner. Whenever I spoke to him about this he answered that he would have his wife wherever he wished and that that was his business.

R. HOELKE. [43]

United States of America,
Third Division, Territory of Alaska.

I, F. C. Driffield, United States Commissioner in and for the Territory of Alaska, and the Commissioner appointed by the annexed Commission, do hereby certify that the witness R. Hoelke, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that said deposition was taken at Unga, in said Territory of Alaska, on the 1st day of March, 1915; that said deposition was reduced to writing, and when completed was carefully read by said witness, and after being by him corrected was

by him subscribed in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said Territory of Alaska on this 1st day of March, 1915.

[Seal]

F. C. DRIFFIELD,

United States Commissioner in and for the Territory of Alaska, and the Commissioner Appointed by the Foregoing and Annexed Commission. [44]

[Answers of R. Hoelke to Cross-interrogatories.]

In the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

BE IT REMEMBERED that pursuant to the Commission hereunto annexed, and on the 1st day of March, 1915, in the Territory of Alaska, United States of America, before me, F. C. Driffield, a Commissioner of the United States of America in said Territory of Alaska, and the Commissioner appointed by the annexed Commission, personally appeared R. Hoelke, a witness produced on behalf of the respondent in the above-entitled cause now pending in the above-entitled court, who being by me first duly sworn, was then and there examined and his

deposition taken in writing in answer to the cross-interrogatories annexed to the said Commission, and he testified as follows:

I.

A. No, he did not.

II.

A. No, he did not.

III.

A. I received written instructions from the headquarters of my Company on the same vessel that Mr. Ericksen arrived in at Pirate Cove, the schooner "Golden State," which arrived on June 12th, 1914.

IV.

A. He did. [45]

V.

A. No, I did not keep any memorandum.

VI.

A. Yes, I depend entirely on my memory.

VII.

A. About 30 men.

VIII.

A. They were principally engaged in fishing. At other times they would be employed in unloading and loading our vessel, the "Golden State."

IX.

A. About 30 men.

X.

A. Yes, but entirely at their option.

XI.

A. Sometimes at daybreak, sometimes later, but it was all according to the weather.

XII.

A. It all depended as to their success in catching fish and to weather conditions. If a man filled his dory early he might return before 10 o'clock A. M., but more often would not be in until 3 o'clock P. M.

XIII.

A. Yes.

XIV.

A. When Mr. Ericksen arrived at Pirate Cove I told him to take a couple of days to get settled down, and then to report for work. I showed him what to do in odd jobs around the station, such as shingling, cleaning the warehouses, etc.

XV.

A. Yes, he refused to assist in loading and unloading the "Martha," of which he was in charge. When I instructed him to do so, he [46] answered that he would not do it for me or no other man. This was about the end of June, 1914.

XVI.

A. I told Mr. Ericksen that he was no good to me on the station, as he would never do what I instructed him to do. I gave him some work tying up salt sacks and cleaning out the warehouses. I then went away for about a day, and when I returned I noticed that the work had not been done. I asked him why it was not done. His only answer was, "I will make up for it some other day." One day when he was coming into the Cove on the "Martha," under full sail, I noticed that he was very reckless in his handling of the boat, coming very nearly going on the beach, so when he came on shore I told him he did

not seem to know how to sail her, and that I did not want the boat wrecked. On this occasion I had to send men out in a dory to help him to get to the mooring.

XVII.

A. I always thought that Mr. Ericksen was physically able to do any work asked of him, if he only cared to do so. I never spoke to him about this part of it.

XVIII.

A. No, I never did.

XIX.

A. I never had any conversation with him about his services, as to what to do or rather what he was supposed to do. If I wanted him to do anything I simply told him, and how to do it.

XX.

A. No, it is not.

XXI.

A. Yes, I wrote to the headquarters of my company in San Francisco, Cal. [47]

XXII.

A. I did not keep a copy of that letter, but undoubtedly the company must have it on file.

R. HOELKE.

United States of America,

Third Division, Territory of Alaska,—ss.

I, F. C. Driffeld, United States Commissioner in and for the Territory of Alaska, and the Commissioner appointed by the annexed Commission, do hereby certify that the witness R. Hoelke in the foregoing deposition named, was by me duly sworn to

testify the truth, the whole truth, and nothing but the truth, and that said deposition was taken at Unga, in said Territory of Alaska, on the 1st day of March, 1915; that said deposition was reduced in writing, and when completed was carefully read by said witness, and after being by him corrected was by him subscribed in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said Territory of Alaska, on this 1st day of March, 1915.

[Seal]

F. C. DRIFFIELD,

United States Commissioner in and for the Territory of Alaska and the Commissioner Appointed by the Foregoing and Annexed Commission. [48]

[Answers of N. J. Uldall to Direct Interrogatories.]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

BE IT REMEMBERED that pursuant to the Commission hereunto annexed, and on the 8th day of April, 1915, in the Territory of Alaska, United States of America, before me, F. C. Driffield, a Com-

missioner of the United States of America in said Territory of Alaska, and the Commissioner appointed by the annexed Commission, personally appeared N. J. Uldall, a witness produced on behalf of the respondent in the above-entitled cause now pending in the above-entitled court, who being by me first duly sworn, was then and there examined, and his deposition taken in writing in answer to the Interrogatories annexed to the said Commission, and he testified as follows:

I.

A. My name is N. J. Uldall. My age is 38 years. My occupation is that of an assistant agent of the Union Fish Company. I reside at Pirate Cove, Popoff Island, Alaska.

II.

A. I first worked at Pirate Cove, as such assistant agent, from the 12th of June, 1914, to August 12th, 1914. I then went to Pauloff Harbor, Sanak Island, and relieved the agent there until the 23d of March, 1915, when I again returned to Pirate Cove, arriving there on the 25th of March, 1915, where I have since resided as such assistant agent.

[49]

III.

A. Yes, I do. I have known him since the 20th day of May, 1914, when we both came to Alaska on the same vessel, the "Golden State."

IV.

A. Yes, he worked while I was there, as master of the schooner "Martha."

V.

A. Yes, he did work at various times on shore, but to my personal knowledge I could not say that I saw him any more than a week working on shore, as I was, at times, away myself. All that I could say I saw him doing during that time was a little shingling on the office roof, tying up some bundles of salt sacks, and heading-up two barrels of codfish tongues.

VI.

A. The only answer I can honestly give, is that I had no time or chance by which I could judge of his capability.

VII.

A. The hours while doing shore-work are from 7 A. M. to 5 P. M. When the men go out fishing, they generally went at daylight, returning about noon. This was not compulsory, but practically an understood time among the fishermen.

VIII.

A. I could not say.

IX.

A. I have never heard any conversation between libelant and R. Hoelke, regarding hours of labor.

X.

A. No, I cannot remember ever hearing any such conversation.

XI.

A. I should say that the libelant was very indifferent as to how [50] he performed his work, from the fact that he once told me that he was not satisfied with the way things were at Pirate Cove, also that

he would not work on holidays or before 7 A. M. or after 5 P. M.

XII.

A. I know nothing further than as answered in the foregoing.

N. J. ULDALL.

United States of America,
Third Division, Territory of Alaska,—ss.

I, F. C. Driffield, United States Commissioner in and for the Territory of Alaska, and the Commissioner appointed by the annexed Commission, do hereby certify that the witness N. J. Uldall in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that said deposition was taken at Unga, in said Territory of Alaska, on the 8th day of April, 1915; that said deposition was reduced to writing, and when completed was carefully read by said witness, and after being by him corrected was by him subscribed in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said Territory of Alaska on this 8th day of April, 1915.

[Seal]

F. C. DRIFFIELD,

United States Commissioner in and for the Territory of Alaska and the Commissioner Appointed by the Foregoing and Annexed Commission. [51]

[Answers of N. J. Uldall to Cross-interrogatories.]

*In the District Court of the United States in and
for the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Respondent.

BE IT REMEMBERED that pursuant to the Commission hereunto annexed, and on the 8th day of April, 1915, in the Territory of Alaska, United States of America, before me, F. C. Driffield, a commissioner of the United States of America, in said Territory of Alaska, and the commissioner appointed by the annexed commission, personally appeared N. J. Uldall, a witness produced on behalf of the respondent in the above-entitled cause now pending in the above-entitled court, who being by me first duly sworn, was then and there examined and his deposition taken in writing in answer to the cross-interrogatories annexed to the said commission, and he testified as follows:

I.

A. I did.

II.

A. Yes; to Pauloff Harbor, Sanak Island, Alaska.

III.

A. I left Pirate Cove on or about the 14th of June, 1914, and returned on the 3d of July, 1914.

IV.

A. About eighteen days. [52]

V.

A. I did the bookkeeping, had charge of the store, and also used to tally the fish.

VI.

A. As far as I can remember, it was about two days we worked together.

VII.

A. I never said he was unable to do the work given him, nor did I ever tell him so.

VIII.

A. No, it was not.

IX.

A. No, I did not.

X.

A. No, I am not.

XI.

A. I cannot positively say that I was.

XII.

A. No, I never did.

N. J. ULDALL. [53]

United States of America,

Third Division, Territory of Alaska,—ss.

I, F. C. Driffeld, United States Commissioner in and for the Territory of Alaska, and the commissioner appointed by the annexed commission, do hereby certify that the witness N. J. Uldall in the

foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that said deposition was taken at Unga, in said Territory of Alaska, on the 8th day of April, 1915; that said deposition was reduced to writing, and when completed was carefully read by said witness, and after being by him corrected was by him subscribed in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in said Territory of Alaska, on this 8th day of April, 1915.

[Seal] F. C. DRIFFIELD,
United States Commissioner in and for the Territory
of Alaska and the Commissioner appointed by
the foregoing annexed Commission.

[Endorsed]: Opened by Order Court and Filed
Jun. 4, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

[Notice of Taking Deposition of William Wallstedt.]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Defendant.

The libelant above named and his proctor will please take notice that the deposition of William Wallstedt will be taken *de bene esse* on behalf of the defendant, on Friday, the 9th day of October, 1914, commencing at the hour of four o'clock in the afternoon, before Francis Krull, Esquire, United States Commissioner, at his office on the third floor of the United States Post Office and Court House Building, at the end of said building nearest Market Street, in the City and County of San Francisco, State of California, at which time you are notified to be present and put such interrogatories to said witness as you may see fit.

You will further take notice, that the cause for taking the deposition of said witness, is that he is bound on a voyage to sea.

Dated October 8th, 1914.

Yours, etc.,

H. W. HUTTON,

Proctor for Defendant.

Copy received this 8th day of October, 1914.

F. R. WALL,

Proctor for Libelant. [55]

[Deposition of William Wallstedt, for Defendant.]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY,

Defendant.

BE IT REMEMBERED, that on Friday, the 9th day of October, 1914, pursuant to notice filed in the above-entitled cause, at my office, in the Postoffice and Courthouse Building, Room 308, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., William Wallstedt, a witness produced on behalf of the defendant.

F. R. Wall, Esq., appeared as attorney on behalf of the libelant, and H. W. Hutton, Esq., appeared as attorney for the defendant, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth:

(It is hereby stipulated that the deposition, when written out, may be read in evidence by either party

(Deposition of Sven William Wallstedt.)

on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at [56] the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the deposition of said witness William Wallstedt may be taken in shorthand by E. W. Lehner. It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [57]

SVEN WILLIAM WALLSTEDT, called for the respondent, sworn.

Mr. HUTTON.—Q. What is your occupation, captain? A. Seafaring man; master mariner.

Q. What vessel are you master of?

A. The gasoline schooner "Golden State."

Q. How long have you been a master mariner?

A. 25 years.

Q. Whose employ are you in?

A. The Union Codfish Company.

Q. How long have you been in their employ?

A. About 30 years.

Q. Where have you been running? A. Alaska.

Q. When you say the Union Codfish Company, do you mean the Union Fish Company?

A. The Union Fish Company.

Q. Where have you been running for them while

(Deposition of Sven William Wallstedt.)

you have been sailing for them?

A. I ran up to what they call Shumagin Islands.

Q. Where is Pirate Cove?

A. That is on what they call the Popoff Island.

Q. Is that anywhere near Unga?

A. About 15 miles from Unga.

Q. Does the Union Fish Company have any stations up there?

A. In Unga, they have got one station.

Q. Have they any anywhere else?

A. Yes, they have got one on Nagai Island.

Q. And what other place?

A. They have got one station in Northwest Harbor.

Q. How about Pirate Cove?

A. Pirate Cove is on Popoff Island.

Q. Is that a station, too? A. Yes.

Q. Do they get codfish from there? A. Yes.

Q. Do you know Mr. Ericksen, the libelant in this case? A. Yes.

Q. How long have you known him?

A. Well, he was sailor with me, I don't know how many years ago; he was along with me as a seaman, 14 years ago. [58]

Q. Was he connected with your vessel here within the last few months?

A. Well, yes, he was second mate with me from San Francisco up to Pirate Cove; that was the last trip.

Q. When you got to Pirate Cove, where did Ericksen go? A. He went ashore at Pirate Cove.

(Deposition of Sven William Wallstedt.)

Q. Did you see him doing anything there at Pirate Cove?

A. Yes, he was running the schooner "Martha" at one time, and then he was working ashore there in the station.

Q. How long did your vessel stay in Pirate Cove when you first got there, Captain?

A. I only stayed there three days when I first got there.

Q. After that, where did you go?

A. I went over to Unga and from Unga over to Sanaak Islands, a place called Poloff Harbor, where they have got a station; then I went from there to Dura Harbor; that is on Unamak Island. From there I went back to Pirate Cove.

Q. When you got back to Pirate Cove, how long did you stay there?

A. I think about a week, if I ain't mistaken.

Q. Then where did you go?

A. Then I left Pirate Cove and went over to Ushini.

Q. Did you afterwards come to San Francisco?

A. Yes, I went from Ushini over to Northwest Harbor and then came to San Francisco.

Q. Did Ericksen come back with you? A. Yes.

Q. When you first arrived there, I think, Captain, you stated you stayed three days? A. Yes.

Q. What was Ericksen doing during that time?

Mr. WALL.—He has already answered that, I submit.

(Deposition of Sven William Wallstedt.)

Mr. HUTTON.—He can answer it again.

A. He was not doing anything to start with. He took his clothes on shore, and I guess he straightened up the house where he was [59] going to live; that is the most I seen him during the first three days he was there. Then he was helping the agent a little around there.

Q. Did you see him doing any work?

A. Yes, I saw him do it.

Q. What did you see him do?

A. I seen him up on the roof there fixing up shingles, putting shingles on the roof, and I saw him packing up codfish tongues.

Q. Anything else?

A. No, not that I can remember.

Q. When you came back again, did you see Ericksen doing anything?

A. Yes, I saw him when I first came back, I think he came back with the “Martha” when I arrived there, after my return from the stations—came back off the steamer “Martha.”

Q. How many days after you got back did he come back from the “Martha”?

A. I think the day I arrived at Pirate Cove.

Q. Did he go out on the “Martha”? A. Yes.

Q. How many times did he go out on the “Martha” after you got back to Pirate Cove?

A. Three times; he was after fish two trips, codfish, over to Sand Point.

Q. Was he running the “Martha” the whole time,

(Deposition of Sven William Wallstedt.)

the week that you were there before you left?

Mr. WALL.—I object to the question as leading.

Mr. HUTTON.—That is for the Court to rule on.

A. Well, he was running her, and then he was discharging her, and he went back—he was working there discharging from the “Martha” on board my schooner, the “*Golden Gate*.”

Q. Did you see him do any other work during that week you were there after you returned to Pirate Cove except running the “Martha” or discharging fish from her?

Mr. WALL.—I object to that as leading and suggestive. A. Yes.

Mr. HUTTON.—Q. What did you see him do?
[60]

A. Well, he was doing odd jobs around the station there, cleaning up and fixing up things very little. I didn't see any other kind of work he was doing there when I was there.

Q. What time in the morning did he use to turn to, do you know?

A. He never turned to before 7 o'clock, and I guess the agent had to go in and call him out then.

Q. What is the customary time of turning to up in Pirate Cove, at that time?

A. Well, 5 o'clock, that is the time the fishermen go out; they get up before that to get breakfast, and then go out fishing.

Q. Did you ever hear any conversations between him and the agent? A. Yes, I heard a little.

(Deposition of Sven William Wallstedt.)

Q. What conversation?

A. He had a fall out there, Mr. Ericksen did.

Mr. WALL.—I object to that as immaterial, irrelevant and incompetent unless it is shown he was present when it took place.

A. Mr. Ericksen, with the agent there, he had a fall-out.

Mr. HUTTON.—Q. What was the conversation?

A. Well, Mr. Ericksen, he wanted his wife along with him on the boat when he went out.

Mr. WALL.—I object to that, and ask that it be stricken out as calling for a conclusion of the witness, and not responsive.

Mr. HUTTON.—Q. Finish your answer.

A. The agent, he would not allow it. He says he was up there for business; "we ain't out for pleasure; your wife has got a good house to live in and she will be satisfied here until you come back." They had a fall-out. He wanted to take her away and he wouldn't let him.

Mr. WALL.—I ask that the answer be stricken out because it contains conclusions of the witness that cannot be separated from what the actual conversation was. He can state what the conversation was.

[61]

Mr. HUTTON.—Q. Captain, what was the first thing you heard Ericksen say in respect to that to the agent?

A. Well, I heard him say once there he would not work more than from 7 to 5 for anybody.

Q. What was the first thing that you heard Erick-

(Deposition of Sven William Wallstedt.)

sen say to the agent about taking his wife in the boat? What did he say to the agent?

A. Well, he says he would take her.

Q. Just repeat the conversation, just exactly what Ericksen said and what the agent said.

A. "Well," he says, "I would like to have my wife along with me in the boat when I go out with her, run to those stations," and the agent told him then, he says, "You cannot take your wife along with you; there is no accommodations for her on the boat, you are bound to have one man along with you when you go, and there is only two beds, and with only two beds to sleep in, there could not be any accommodation for your wife at all in that boat."

Q. Then what did Ericksen say?

A. I don't remember what he did say. He had a little falling out there, I can't remember. I understood he said he was dissatisfied with the place, he would like to come down; that is what he told the agent.

Q. What was the name of the agent?

A. His name is Rudolph Hoelke.

Q. Did you hear Ericksen tell the agent that he was not satisfied up there? A. Yes, I did.

Q. When was that?

Mr. WALL.—I would like to have the objection made to that last question, that it is leading and suggestive.

Mr. HUTTON.—Q. When did you hear Ericksen tell Hoelke that?

(Deposition of Sven William Wallstedt.)

A. When I came back from the stations; I came back the last time to Pirate Cove, before I went down. [62]

Q. What did the agent say?

A. He says he had no objection, if he wanted to go down he could go down.

Cross-examination.

Mr. WALL.—Q. Captain, how much stock have you got in the Union Fish Company?

Mr. HUTTON.—That is objected to as immaterial.

A. Do I need to answer that?

Mr. WALL.—Yes.

Mr. HUTTON.—I don't think you have to answer that, Captain. I object to it upon the ground it is not proper cross-examination, and it is an unwarranted interference into this man's private business affairs. I will admit here that he is interested in the Union Fish Company; the extent of his interest is not material.

Mr. WALL.—Q. Do you hold any stock in the Union Fish Company?

A. Yes, I have got a few stocks, yes.

Q. Do you remember having some trouble with Ericksen about 14 years ago when you knew him as a seaman?

A. No; we had no trouble that I can remember.

Q. Were you captain of the "Ormo" about 14 years ago, up there in Alaska? A. Yes.

Q. Don't you remember having some trouble with him at that time?

(Deposition of Sven William Wallstedt.)

A. Well, there might be a few words off and on; sailors have a little growl or row, and they don't amount to anything; that is a common thing on board.

Q. Don't you remember ordering him and some others to clean some paint work at one time after you had started out at 4 o'clock in the morning?

A. No, I don't remember that.

Q. Don't you remember the seamen refusing to do it? A. No.

Q. Don't you remember starting toward him as though you were going to strike him?

A. I never did. [63]

Q. You never did? A. No.

Q. At no time? A. No.

Q. Do you remember having some trouble with Ericksen's wife coming down? A. Yes.

Q. On the boat? A. Yes.

Q. Do you remember the start of that trouble, your saying in her presence that she ought to be wearing breeches, or words to that effect?

A. That is what I did.

Q. That was on the trip down from Pirate Cove to San Francisco, was it not? A. Yes.

Q. Ericksen and his wife were on board coming down? A. Yes.

Q. As a result of that trouble she hit you with a coffee-pot or a mug or something of that kind?

A. No. She had a coffee-cup and she threw the coffee on me.

(Deposition of Sven William Wallstedt.)

Q. Who threw it over you?

A. Mrs. Ericksen. Can I explain a little now?

Mr. HUTTON.—Yes.

A. She commenced to run down the agent in Pirate Cove, that he was no man at all, and he was a thief, and she told me—I heard her say he was stealing in the store. So I told her, I says, “It is pretty hard for you to say that he is stealing; you can’t say that if he is selling articles in the store and putting money in his pockets, you can’t prove he is stealing.” She says, “He is no man at all,” and I says, “Well, I have been there so many years going up and down, and I have always found him to be a first-rate man; he never troubled anybody.” So I told her, I says, “Well, I think you ought to wear pants and your husband *out* to wear a woman’s dress.” That is the time she threw the coffee over me.

Mr. WALL.—Q. Are you master of any vessel now?

A. I am master of the schooner “*Golden Gate*.”

[64]

Q. Where is she now?

A. Lying down between Pier 38 and Pier 40.

Q. How long will she be there?

A. I think she will leave about Wednesday or Tuesday.

Q. This coming Wednesday or Tuesday, you think? A. Yes.

Q. Where is she going?

A. Going up to Pirate Cove.

Q. Will she go now, or wait until the spring time?

(Deposition of Sven William Wallstedt.)

A. No, she is going now, Wednesday; I am loading her up now.

Q. You mean Wednesday of next week?

A. Yes.

Q. Do you know whether she has orders to sail at that time, or not?

A. No, I do not. She will sail as soon as she gets ready,

Q. You, as master, would have orders when she was going to sail, wouldn't you?

A. Yes, I have got orders to sail when she is loaded.

Q. Where is she loading?

A. She is loading salt to-day; we are taking in salt. I guess to-morrow we will take in merchandise.

Q. Your orders are to sail as soon as she is loaded?

A. Yes.

Q. Where did your vessel lie when she was in Pirate Cove? A. Alongside of the wharf.

Q. As master of the vessel, you were aboard of her most of the time?

A. Most of the time; I would go up on the wharf there sometimes, around the station and the office.

Q. Did you generally sleep aboard your own vessel? A. Yes.

Q. Every night? A. Every night; yes.

Q. What was your routine in the morning aboard your vessel?

A. What am I doing in the morning?

Q. Yes, in port up there?

(Deposition of Sven William Wallstedt.)

A. I am around the vessel to see everything, the work that goes on; we are working taking in cargo or discharging cargo. [65]

Q. That was your routine up there, was it, to lie alongside the wharf? A. Yes.

Q. Were you taking in cargo all the time that you were up there the first three days when you first got there? A. No, I was discharging cargo.

Q. What time did you begin to discharge cargo in the morning? A. 7 o'clock in the morning.

Q. And you were on board in the morning seeing that everything was gotten ready to discharge, were you? A. Yes.

Q. How do you know what time Ericksen turned out at the time you were there?

A. I never seen him up before 7 o'clock; in fact, after 7 o'clock.

Q. That is the only way you know about it, is it?

A. Yes.

Q. What was the first conversation you heard between the agent and Ericksen? Was that after you got back to Pirate Cove after this trip around the islands? A. Yes, that was the first time.

Q. It was after that time, was it? A. Yes.

Q. What date was it, do you remember?

A. That I don't remember.

Q. How long was it before you sailed?

A. It must be about 3 or 4 days.

Q. After you had the conversation, did Ericksen make a trip with the "Martha"? A. Yes.

(Deposition of Sven William Wallstedt.)

Q. Where did this conversation take place, this first conversation? A. Right alongside the vessel.

Q. Alongside of the "Golden Gate"?

A. Yes, on the wharf.

Q. Were you on the wharf or on the vessel?

A. I was on the vessel.

Q. You were on your vessel? A. Yes.

Q. How far off on the wharf were they from you?

A. About 10 feet.

Q. How large a vessel is your vessel?

A. She is about 140 feet long and 32 feet beam.

[66]

Q. How much of a bulwark has she got?

A. She has got about 4 feet, a little over 4 feet.

Q. Where were you on your vessel when you heard this conversation?

A. I was on the inside, toward the wharf.

Q. What were they doing on your vessel at the time?

A. That I don't remember, what my crew was doing; we were not doing any cargo work at that time.

Q. Were you going around on your vessel from one place to the other, or did you stand still during the whole conversation, in the one place?

A. I was standing still; it didn't last over 9 or 10 minutes, the conversation.

Q. Who started this conversation, Ericksen or the agent? A. Ericksen.

Q. How did it happen; did Ericksen come up to the agent, or did the agent come up to Ericksen?

(Deposition of Sven William Wallstedt.)

A. Well, I think that the agent gave orders to Ericksen to go to Sand Point for fish.

Q. You think that the agent gave him orders; you didn't hear him give that order?

A. No, I didn't exactly. Mrs. Ericksen was down there alongside, too, at the same time, and then Mr. Ericksen, he wanted his wife along on the boat, and the agent would not allow it; he said, "There is no accommodations for a lady down there"; that it is a small cabin only with two beds, and he has to have one extra man sometimes along, too.

Q. Was it at that time that you say you heard him say he would not work longer than 7 to 5? A. No.

Q. That was some other time?

A. That was some other time.

Q. How long was that before you left, or was it when you first got up there?

A. No, it was when I came back there.

Q. How long was that before you left?

A. Well, I think it must be about when I came in the second time.

Q. Where did that conversation take place? [67]

A. Well, it took place right a little way from the vessel there, up on the wharf, too.

Q. Were they up on the wharf when they were talking? A. Yes.

Q. Were you on your vessel?

A. No, I was on the wharf.

Q. Where were you on the wharf?

A. Well, I was a little ways; I don't think I was

(Deposition of Sven William Wallstedt.)

far away from them. I heard him say to the agent he would not work more than from 7 to 5 for anybody.

Q. What was said before that between them?

A. I don't remember.

Q. You did not hear anything else said except that?

A. No, I did not. They might have had some conversation between themselves.

Q. Did you hear any other conversation between them at that time at all? A. No.

Q. Nothing at all? A. No.

Q. All you heard was that Mr. Ericksen said what you say,—he would not work? A. Yes.

Q. You did not hear the agent say anything at that time before that? A. No.

Q. Nothing at all? A. No.

Q. That is all you heard Mr. Ericksen say, he would not work except from 7 to 5? A. Yes.

Q. You were standing right close to them?

A. Yes.

Q. You did not hear a single thing else? A. No.

Q. As I understood you, Captain, you said at first that you thought Ericksen said that he wanted to go back to San Francisco; is that correct? A. Yes.

Q. When did that conversation take place, when you thought you heard him say that?

A. Well, I think just when I came back. I know Mrs. Ericksen was on board there.

Q. I am talking about the conversation?

(Deposition of Sven William Wallstedt.)

A. I heard that he told that to some fisherman, too, he didn't like it there, he could not get along with Holke, and wanted to go back, he was dissatisfied. [68]

Q. That is what you heard that he told some fisherman, he could not get along with Holke, and he wanted to go back? A. Yes.

Q. That is all you know about it, that he wanted to go back; is that correct? A. Yes.

Mr. HUTTON.—You are going to sea some time next week? A. Yes.

Q. And you will be gone how long?

A. About two months.

Mr. WALL.—I won't make any *object* to that; I won't raise any point as to that. I would like an objection to go to that line of questioning; I ask that all his testimony as to any conversation about Ericksen wanting to leave be stricken out on the ground it is hearsay and as irrelevant and immaterial.

Mr. HUTTON.—Make that objection at the trial. [69]

[Commissioner's Certificate to Deposition of William Wallstedt.]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that on Friday, the 9th day of October, 1914, in pursuance of the notice filed in the above-entitled cause, at my office, in the Postoffice and Court House Building, Room 308, in the City and

County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner, for the Northern District of California, to take acknowledgments of bail and affidavits, etc., William Wallstedt, a witness produced on behalf of the defendant in the cause entitled in the caption hereof, and F. R. Wall, Esq., appeared as attorney on behalf of the libelant, and H. W. Hutton, Esq., appeared as attorney for the defendant, and that the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the attorneys the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the Clerk of the United States District Court for the Northern District of California.

And I do further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption. [70]

IN WITNESS WHEREOF, I have hereunto set

my hand at my office aforesaid this 22d day of December, 1914.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of
California, at San Francisco.

[Endorsed]: Filed Jun. 15, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [71]

*In the District Court of the United States for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,706.

Before Hon. MAURICE T. DOOLING, Presiding.
JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY, a Corporation,
Defendant.

(Testimony Taken in Open Court.)

Counsel Appearing:

For Libelant: F. R. WALL, Esq.

For Respondent: H. W. HUTTON, Esq.

Wednesday, June 16, 1915.

[Statement of the Case by Mr. Wall.]

Mr. WALL.—If your Honor please, this is a libel for breach of contract. The libel alleges that in the month of May of last year in San Francisco the respondent Union Fish Company and the libelant, John W. Erickson, entered into an oral contract of hiring wherein it was agreed that libelant was to proceed to *Pirate Voce*, Alaska, and after arrival there to serve the respondent as master of the schooner

“Martha” for a period of not less than one year, and also during that time to assist the manager of the respondent’s salting station at Pirate Cove when possible to do so without interfering with libelant’s duties as master of the schooner; that it was further agreed that libelant was during that time to receive for his services wages at the rate of \$55 a month and board and lodging for himself and his wife and at the end of not less than one year transportation from Pirate [72] Cove back to San Francisco. That in accordance with the agreement libelant proceeded to Pirate Cove, where he arrived about the 12th day of June, and entered upon the performance of his duties aforesaid and continued to perform them until the 18th day of July, when he was without fault on his part discharged from the service of respondent and he and his wife were thereupon by said respondent furnished with transportation from Pirate Cove to San Francisco, and that respondent has paid the libelant wages at the rate of \$55 a month up to and including the 15th day of July, 1914, and furnished board and lodging to libelant and his wife up to August 5, 1914, and for no other or further time. That at all times since then the libelant has been ready, able and willing to perform his part of the contract of hiring. That he has suffered damages in the sum of \$1,430; that the case is within the jurisdiction of this Court.

The answer denies that the libelant was hired by it to proceed to Pirate Cove or any other place and there work for it for a period of not less than one year, and in that behalf it alleges that no period of

service was ever agreed upon between libelant and respondent.

It denies that it was ever agreed that libelant should proceed to Pirate Cove and there serve respondent as master of the "Martha" and to assist the manager.

It admits that libelant was hired for a time not specified to proceed to Pirate Cove, Alaska, and there work for respondent as master of the schooner "Martha," but was not engaged to work under the superintendence of the manager.

It denies that it was ever agreed between libelant and respondent that libelant's wages while he was working for it should be \$55 a month and board and lodging for himself and his wife; it admits that libelant's wages were agreed upon at \$55 a month and [73] board and lodging for himself only, but by permission of respondent libelant took his wife to Pirate Cove with him on one of respondent's vessels, but respondent denies that as a part of the consideration of libelant's employment by it, it ever agreed to furnish his said wife board or lodging. It denies that it ever agreed that at the expiration of not less than one year transportation should be furnished for libelant and his wife; it admits, however, that it is the custom to furnish transportation for its employees and their wives and families working at said Pirate Cove to said San Francisco whenever the term of service of such employee ends.

It denies that libelant ever entered upon the performance of any duties for respondent under the or any agreement mentioned in libelant's libel, or that

he ever entered upon any duties a part or any of which was to assist the manager of respondent at said Pirate Cove, or that he ever entered upon any duties whatever at said Pirate Cove under and by which he was to serve respondent for a period of not less than one year at said place or under any agreement by which he was to serve said respondent for that period.

Respondent alleges that libelant was hired by it to proceed to said Pirate Cove and there work for it partly as master of the schooner "Martha" and partly on shore; that no term of service was agreed upon between libelant and respondent; that pursuant to such agreement libelant shipped as second mate on one of respondent's vessels and proceeded to said Pirate Cove, at which place he commenced to and did work for respondent partly as master of the schooner "Martha" and partly on shore; that while so working he would not work according to the customs of the business in which he was engaged, in this, that at said Pirate Cove there was at the time libelant so worked there and [74] had been for many years prior to his doing such work a custom that men should commence to work at such work as libelant did at 5 o'clock in the morning and continue to work as late in the evening as was necessary, the work respondent being engaged in at said place being the catching and salting of codfish, and at times late hours are necessary in such business, and it was also the custom at said place to work Sundays; that libelant was familiar with the custom when he was employed, as he had worked in Alaska

at the same business before; that libelant would not and did not commence to work while he was working under the employment aforesaid at said Alaska before 7 in the morning, and he would not work on Sundays at all; that his method of doing work when he did do any was unsatisfactory in this, that he was slow, grumbled about the work he was asked to do, and at times would not work at all. That while at said Pirate Cove libelant demanded work of respondent at a station different to the station for which he was employed; that he was careless in his work and dissatisfied with his employment, and that thereupon he was discharged by libelant's superintendent at said Pirate Cove, to which discharge he assented, and an account was thereupon stated between libelant and respondent of all matters and things that existed between them by which account a balance was shown to be due to the libelant from the respondent in amount the sum of \$87.64, which sum was paid to him by this respondent on the 7th day of August, 1914, and libelant received and accepted the same in full of all claims and demands against said respondent.

That at the time libelant worked for respondent at said Pirate Cove, respondent had a large number of men at work for it at said place, consisting of fishermen, fish splitters, salters and other men engaged in work incident to a codfish station and [75] necessary in doing the work thereat.

Respondent denies that by reason of any act or omission of it, or by reason of any breach of contract of hiring of libelant by it, or by reason of any-

thing else ever existing between the libelant and respondent, the libelant has been damaged in the sum of \$1,430, or any other sum or has suffered any damage whatever.

Respondent denies that the premises stated in the libel are true, except as they may be specially admitted herein, or admitted by a failure to deny the same, and denies that the matters stated in said libel are either within the admiralty and maritime jurisdiction or the admiralty or maritime jurisdiction of the United States or of this Honorable Court.

[Testimony of John W. Erickson, the Libelant.]

JOHN W. ERICKSON, the libelant, sworn.

Mr. WALL.—Q. You are the libelant or the person who is suing for damages for breach of this contract of hiring, are you not? A. Yes, sir.

Q. What is your usual business or occupation,—what do you follow for a livelihood? A. The sea.

Q. You were hired by the Union Fish Company for certain services in Alaska last year, were you not?

A. Yes, sir.

Q. State with whom you held the conversation when you were hired to work for the Union Fish Company at the times mentioned in your libel?

A. Mr. Overton. I first seen Mr. Cox.

Q. Who was Mr. Overton?

A. Mr. Overton was the managing owner of the Union Fish Company.

Mr. HUTTON.—I move to strike that out, if your Honor please, on the ground that he cannot know who Mr. Overton was or what he was. [76]

The COURT.—He might know; motion denied.

(Testimony of John W. Erickson.)

Mr. WALL.—Q. In whose service were you at the time? A. The Union Fish Company.

Q. What had you been doing?

A. I was running the sloop "Union."

Q. About the Bay of San Francisco?

A. Yes, sir.

Q. How long had you been working for the Union Fish Company?

A. From about the 25th of January, until May 17th.

Q. State how you happened to take up with the Union Fish Company getting a job in Alaska?

A. I was working on the sloop "Union," and I had to live across the bay at Belvedere Island, and my wife had to live over here because there was no place here to rent a house; I only received \$60 a month and it took pretty near all of the \$60 to board my wife on this side. I was up in Alaska before working for the McCullom Company at one time and so I asked Mr. Cox—

Q. Who is Mr. Cox?

A. Mr. Cox is agent or clerk—

Mr. HUTTON.—I object to what he said to Mr. Cox until it is shown who Mr. Cox was.

The COURT.—He is trying to show that now.

A. (Continuing.) Mr. Cox was the clerk for the Union Fish Company.

Mr. WALL.—Q. What did you ask him?

A. I asked him if he thought there was any jobs in Alaska such as taking care of a station, something like that—

(Testimony of John W. Erickson.)

Mr. HUTTON.—We still object to this as hearsay, on the ground that there is nothing to show that Mr. Cox had any authority to bind the respondent.

Mr. WALL.—This is just preliminary.

A. (Continuing.) I asked him and he said he would see Mr. Overton. The next day when I came with my cargo from Union City, I always had a list or a letter to take to the Union Fish Company, and I took that up and I seen Mr. Overton. [77]

Q. Where did you see him? A. In the office.

Q. In the office of what?

A. In the office of the Union Fish Company. Mr. Overton said, “I hear, Cap., you want to go to Alaska.” I said, “Yes, if there is a show I would like to go up there,” and then he offered me to go up as master of the schooner “Martha” and assist Hoelke, the superintendent of the Pirate Cove, when I was not busy in the “Martha.” Then he told me he would give me \$55 a month and everything found; and I says, “A house for my wife and myself?” and he said, “Yes; that’s all right.” I says, “Well, I could not promise you just yet, but I will go over and see my wife and see if she is willing to go.” I met my wife over at Washington and East streets and we went in to a restaurant to have our dinner and I told my wife and she said, “All right, I will go.”

Mr. HUTTON.—That is all hearsay, your Honor.

The COURT.—That is hearsay; yes.

Mr. WALL.—Q. When you had your conversation with Mr. Overton, state whether or not anything was

(Testimony of John W. Erickson.)

said as to how long a time you were to go for.

Mr. HUTTON.—I object to that upon the ground that it is leading.

The COURT.—The objection is overruled.

A. Mr. Overton told me that he didn't feel like sending a man up only for a year; he said, "We like to see a man go up there and stay for 3 or 4 or 5 years, or 10 years"; he said, "Of course, we wouldn't send up anybody for less than a year under no circumstances, as that is the old custom, it has been since the Union Fish Company or the McCullom Fish Company started in Alaska," and I said, "If I can get along, I don't want to come down in a year; I would like to stay up there and make a little money."

Q. What, if anything, was said about the expenses of your wife while up there?

Mr. HUTTON.—The same objection, your Honor, that it is leading. [78]

The COURT.—The objection is overruled.

A. My wife and I are supposed to be found, everything, that is to say, except clothing; but house rent and my board we were entitled to up there, either to eat in the company's house or to get the stores from the store and cook for ourselves.

Q. What services were you to perform while you were up there?

A. I was supposed to run the schooner "Martha" when they needed her to take fish from the other stations, from the stations around there, to Pirate Cove.

Q. When did you get there?

The COURT.—Q. And what else?

(Testimony of John W. Erickson.)

A. And to assist Mr. Hoelke in counting fish and helping him in general around the station.

Mr. WALL.—Q. When did you get there?

A. We got there about the 20th of June.

Q. Last year? A. Yes, sir.

Q. After you got there did you make any trips with the “Martha”? A. Yes, I made five trips.

Q. About what time did you start on your first trip from Pirate Cove, about how long after you got there?

A. About 4 or 5 days, or something like that.

Q. Where did you go?

A. To a place called Sanburn.

Q. When did you return?

A. I returned the following day.

Q. And how long after that before you started on your second trip?

A. About three days, about two or three days.

Q. Where was that?

A. That was to Porter’s Bay, on the mainland.

Q. How long did that take?

A. That took me three days, 3 or 4 days, I would not say for sure.

Q. How long after that was it before you started on the third trip? A. A couple of days.

Q. Where was that third trip to?

A. That was down to the [79] Northwest Harbor and Siminoff Islands.

Q. How long did that take?

A. It took me, I think, five days.

(Testimony of John W. Erickson.)

Q. And how long was it after that you started on the fourth trip?

A. Only a couple of days and I started for Sanburn again and made a trip after fish, and then in a couple of days again I went over for another load of fish.

Q. How long after the fourth trip before you started on the fifth trip?

A. A couple of days—I think only one day because I was supposed to leave there before the 4th of July.

Q. Where was that to? A. Sanburn.

Q. How long did that take you? A. Two days.

Q. How long during the time you were up there were you on shore at Pirate Cove?

A. I could not say for sure, but practically 7 or 8 days.

Q. While you were at Pirate Cove, what work did you do on shore?

A. I done what I was asked to do, bundling up sacks, and I shingled some roofs and I packed some tongues; one day Mr. Hoelke was away and I counted the fish. Otherwise he told me he did not trust me to count fish.

Q. State just exactly what happened when you severed your relations with the Union Fish Company up there, and what was said to you and by whom.

A. I think I just came from Sanburn; I could not say whether I went ashore that day or whether I came from Sanburn that day, but in the evening, about 5 or half-past 5—about half-past 5, I was eating my supper and Mr. Hoelke came over to the

(Testimony of John W. Erickson.)

house, and my wife was standing out in the kitchen, and he said, "Is Erickson here?" and she said, "Yes; he is having his supper." He says, "When he is through tell him to come over to the office." I quit eating right there and I went right over to the office and when I got over to the office Mr. Hoelke told me, "You better pack your stuff, go down in the 'Golden State' to-morrow." And so I says, [80] "All right." That is all I said.

Q. State whether or not at any time while you were there you ever requested to be discharged.

A. No, I never requested to be discharged.

Q. When you came back, when did you leave Pirate Cove? A. I can't remember the date.

Q. About what time?

A. I think it must have been somewhere around the 18th or 20th.

Q. Of what month? A. Of July.

Q. On the "Golden State"? A. Yes, sir.

Q. What time did you get back to San Francisco?

A. On the 5th of August.

Q. And you and your wife were furnished with board and lodging on the "Golden State" until you arrived here? A. yes, sir.

Q. And also with board and lodging while you were at Pirate Cove? A. Yes, sir.

Q. When you got back here what did you do in regard to getting the wages due you up to that time?

A. I went down to the office and I seen Mr. Pugh. I told Mr. Pugh that—

The COURT.—Q. Who is Mr. Pugh?

(Testimony of John W. Erickson.)

A. He is the president of the Union Fish Company.

Mr. WALL.—Q. This gentleman here (pointing) ?

A. Yes, sir. I seen Mr. Pugh and I said, “I have been to quite an expense in moving my stuff down to the “Golden State” and storing some of it and I had to give away some of it because I could not take it along with me, and also in moving my stuff coming back again and going ashore from the ‘Golden State,’ and I had to take a hotel when I first came here, and stay there about eight days, I think,” or something like that, and I asked him if he would not pay me \$50 more than my wages to reimburse me for the expense I was under, and he said he couldn’t do nothing like that; he said, [81] “You didn’t make your contract with me; you made it with Mr. Overton; you may wait, if you like, until Mr. Overton gets back from Europe and see him, but,” he says, “we couldn’t do nothing like that because we have been under too much expense ourselves; you know it costs us money to take you up there, too.”

Q. What did you say in answer to that, if you said anything? A. I didn’t say nothing.

Q. When he said they had been to considerable expense themselves, what did you say?

A. I said it was not my fault. I went up there to stay and do my work and I didn’t suit and he sent me down.

Q. What expense were you put to when you got down here about moving your things?

(Testimony of John W. Erickson.)

Mr. HUTTON.—I don't think that would be an element of damage, your Honor, assuming he is entitled to any, which we deny.

Mr. WALL.—I will withdraw that.

Q. What expense were you put to in leaving San Francisco to go up there?

Mr. HUTTON.—I don't think that would be an element of damage, if your Honor please, and I object to it upon that ground, that is, assuming that he is entitled to it; we deny that he is entitled to any.

The COURT.—It seems to me the measure of his damages would be what he would have received if he had continued the employment, if he is entitled to damages at all.

Mr. WALL.—Q. After you got back to San Francisco what expenses were you put to?

Mr. HUTTON.—I make the same objection to that, if your Honor please. It is immaterial, irrelevant and incompetent.

Mr. WALL.—His living expenses, his board and lodging; that was a part of his contract. [82]

Mr. HUTTON.—But it is too general.

Mr. WALL.—Q. What expenses have you been under for board and lodging since you arrived in San Francisco, and up to the 12th day of June of this year?

Mr. HUTTON.—I submit that that would be immaterial. If this man was entitled to anything at all for his board and lodging, it would be what it cost in Alaska, and not here.

(Testimony of John W. Erickson.)

Mr. WALL.—That would be against you, then, Mr. Hutton.

The COURT.—The objection is overruled.

Mr. WALL.—Q. What expenses have you been to for your board and lodging since you arrived in San Francisco and up to the 12th day of June of this year?

A. It is what it cost me to live and for rent, \$55 a month, that is what it has cost, because we kept track of the first couple of months of what it would cost us; I could not live on no less than that, \$55 for board and room and gas and milk, and so forth.

The COURT.—Q. That is for yourself and wife?

A. Yes, sir.

Mr. WALL.—Q. When you were paid down here, what sum of money were you paid altogether?

A. The first money I took was \$25; that was the first drawing I made. I would not take all because I had asked for those \$50 to reimburse my expenses and I thought I would wait and see if I could not get that, and so I got \$25 first out of \$87.64, I think, that was due me; a couple of days afterwards I went up and saw Mr. Wall; I asked him if it would interfere with me if I was suing for my expenses if I drew the rest of my money that was due me, and Mr. Wall said “No, you go down and draw your money.”

Q. What was the \$87.64 due you for?

A. For the time I had shipped first as second mate; of course, it was understood I was going up as second mate, so I would lose no time. [83]

(Testimony of John W. Erickson.)

Q. That is, you went second mate on the "Golden State" going up there? A. Yes, sir.

Q. And part of the \$87.64, part of it was for wages as second mate on the "Golden State," was it?

A. Yes, sir.

Cross-examination.

Mr. HUTTON.—Q. When you left Alaska you asked Mr. Hoelke for a statement, did you not, of your time? A. Yes, sir.

Q. And he gave you that, didn't he (showing)?

A. Yes, sir, that is what he gave me.

Q. And that is your name on the back of it, isn't it? A. Yes, sir.

Q. You wrote that? A. For \$25.

Q. And you wrote that name there, didn't you?

A. Wrote for \$25; yes, sir.

Q. I am asking you whether that is your name?

A. Yes, sir.

Q. And you wrote that signature there?

A. Yes, sir.

Mr. HUTTON.—I offer that in evidence, if your Honor please, and ask to have it marked Respondent's Exhibit "A."

Q. Where have you been working since you came down here?

A. I have been working along shore, stevedoring.

Q. Where have you worked?

A. Down on the "Greystock," Pier 26, for the California Stevedoring Company.

Q. What months have you worked, and on what ships?

(Testimony of John W. Erickson.)

A. I could not name every ship. I gave a statement of them sometime ago. I have them here.

Q. Did you work on the "C. T. Hall"? A. Yes.

Q. How much did you earn there?

A. I think I earned \$25, if I am not mistaken.

Q. Did you work on the "Strathstay"?

A. Yes, sir.

Q. How long did you work there?

A. I think I got there \$35 or \$36 there. [84]

Q. How many days did you work there?

A. I think a week.

Q. Did you work on the Pacific Mail Dock?

A. Yes, I worked there on two steamers.

Q. How long did you work there?

A. I only worked there about two days, I think it was.

Q. Did you work on the "Santa Clara"?

A. Yes.

The COURT.—How much did you get from the Pacific Mail? A. I earned \$11.50.

Mr. HUTTON.—Q. Where did you work last?

A. The very last ship I worked—

Q. —When was the last work you did?

A. On the "Santa Clara."

Q. How long ago is that?

A. It is only two days ago.

Q. How long did you work on her?

A. I made \$25 on her; I didn't put that down.

Q. What kind of work did you do?

A. Longshoring, stevedoring.

(Testimony of John W. Erickson.)

Q. Where did you work before that?

A. I worked on the steamer "Eureka."

Q. How many months have you worked altogether since you came down from Alaska?

A. I have not worked steady any months. I didn't do nothing for four weeks until I worked on the "Eureka."

Q. Have you a list there of the places you worked and the ships you worked on since you came down?

A. These are the only people I have worked for.

Mr. WALL.—I object to this line of examination, your Honor, as not proper cross-examination. If he wants that sort of testimony the burden of proof is to produce it directly, if he wants to make the witness his own witness that is a different matter.

The COURT.—The objection is overruled.

Mr. HUTTON.—Q. Will you please tell the Court, commencing with the first work you did when you came down here and finishing with the last, where you worked, who you worked for, and how much you earned? [85]

A. I worked on the schooner "C. T. Hall." \$25. Pacific Stevedoring Company in September, \$35. On the "Murdock," \$11.50. On the "Greystock," for the California Stevedoring Company, Steamer "Santa Clara," \$36. California Stevedoring Company on the "Greystock" in October, \$12. For the California Stevedoring Company on the steamer "S. F. Dollar" in November, \$17.50. On the "Greystock," in November, \$21. Total, \$139.50.

Q. Isn't it \$158? A. Total, \$139.50.

(Testimony of John W. Erickson.)

Q. Where did you work next?

A. As far as I can remember, I didn't put every steamer down—then on the "Santa Clara" in December,—no, on the "Santa Cruz" in December, \$17. December, on the "Santa Clara," \$9; the "Hazel Dollar," \$20. In January, on the "Santa Clara," \$7; on the "St. Cecile," \$9; in February, the steamer "Columbia," \$15; in February, the steamer "Colusa," \$15; in February, the steamer "Great Northern," \$7; in February, the "Great Northern," \$8; in March, the "Santa Cruz," \$18; in March, the steamer "Pacific," \$21; in March, the steamer "Eureka"—she had nitre, \$7. In April, the steamer "Christian Bjoa," \$22.50; in April, the steamer "Chio Maru," \$28; another steamer, \$21.50. In May, the steamer "Santa Cruz," \$21, and the "St. Cecile," \$23; the steamer "Eureka," \$7.75.

Q. Is that all the money you have earned since you came back from Alaska? A. Yes, sir.

Q. Does your wife work? A. Yes, sir.

Q. You remember swearing to this paper, don't you? That is your signature on that? I am calling your attention to interrogatories that were filed and sworn to by you. A. Yes, sir.

Q. It appears to have been sworn to on the 11th day of December, 1914; calling your attention to interrogatory 4—was your recollection good as to what occurred between you and Mr. Overton at the time you signed this? Did you remember the conversation very well? A. Pretty well. [86]

(Testimony of John W. Erickson.)

Q. You remembered it better then than you do now?

A. Well, I suppose I remember it now pretty near as well as then.

Q. Did you testify as follows: "All that was said, as nearly as I can remember, although I don't claim to give the exact words or just the order in which things were said is this, Mr. Overton, first said to me, 'I hear, Cap., you want to go up to Alaska.' I said, 'Yes, I would like to go; I would like to get some station to be boss in and fish at the same time if you want me to, being as I want to take my wife along with me up there'; then he said to me, 'We haven't got no station, but there is a job to run the schooner "Martha Sanburn." If you would like to take that at Pirate Cove I will give you more wages or you may call it more wages than you're getting now; you will get your board and your wife's board and \$55 a month. I would like to have you go up there for at least a year or longer if everything is all right, and when you get through with the job of course we will bring you back.' " Was that correct, as far as you went? A. Yes, sir.

Q. And Mr. Overton did say that, then?

A. Yes, sir.

Q. "I would like to have you go up there for at least a year or longer if everything is all right"?

A. For at least a year.

Q. Why didn't you in these interrogatories say something about Mr. Overton saying that he wanted

(Testimony of John W. Erickson.)

you to stay for 5 or 10 years or something of that kind?

A. I didn't put everything in, but of course he said that besides. In the general conversation he told me that he didn't like to send a man up there for a year or so; he said he would like to see a man stay there for 5 or 6 or 10 years,—and then you get acquainted with the work.

Q. Do you remember Mr. Overton on that occasion saying to you he [87] didn't want you to take your wife up there? A. No, sir.

Q. Didn't he say this to you, "There is no use of your taking your wife up there because you may not like the job and we may not like you"?

A. No, sir.

Q. Wasn't there anything of that kind said?

A. No, sir.

Q. You are sure about that?

A. Sure, positive.

Q. Did you ever sweep the warehouse out up there? A. Yes, sir.

Redirect Examination.

Mr. WALL.—Q. You said on your cross-examination that when you signed that you signed it for the \$25 endorsed up there? A. Yes, sir.

Q. Was that on it at the time you signed it?

A. Yes, sir, it was at the time I signed it for that \$25.

[Proceedings Had Relative to Offer of Depositions in Evidence, etc.]

Mr. HUTTON.—We are in rather an unfortunate position here, if your Honor please. Mr. Overton whom he had the conversation with died here some two or three months ago. We framed our answer upon his testimony.

I will offer in evidence the deposition of William Wallsted and also the deposition of M. J. Uldall and Mr. Hoelke, on both direct and cross.

Mr. WALL.—We would like to have the depositions all received subject to the objection as to each deposition on the ground that the whole of the testimony in each deposition does not relate to the issues made by the pleadings, that is, that it does not tend to prove or disprove any of the issues made by the pleadings. We would like to have that objection run to each of the questions propounded in the interrogatories.

The COURT.—Were these interrogatories prepared here and agreed to before they went up? [88]

Mr. WALL.—All these interrogatories were prepared and sent up with a stipulation which is on file that when they were offered in evidence the same objections could be made exactly as if the questions were asked and answered at the trial. Those objections as to each of the direct interrogatories refer to the depositions of Hoelke and Uldall; and further, the objection to all that part of the answer of Hoelke to the 17th interrogatory beginning with the words

“in the manner of handling the vessel” down to the end. The additional objection as being the conclusion of the witness and not based on any qualifications. The same objections to that part of the answer to the interrogatory 18 beginning with the words “yet not competent to do so” down to the end. The same objection to the answer to direct interrogatory 19. In addition to the objections already made to the interrogatory to Uldall I move to strike out the answer to the 11th direct interrogatory as not responsive to the question. And as to the testimony of Wallsted, which was taken on open interrogatories, on page 5, I move to strike out that portion of the answer thereto,” and I had to go in and call him out then,” as being the mere guess of the witness. And also on page 13 of Wallsted’s deposition I move to strike out that part of his testimony that says, “I heard him tell some fishermen that he didn’t like it up there,” as being hearsay.

Mr. HUTTON.—No, if your Honor please, at the time this answer was filed we, in San Francisco, did not know anything about what occurred in Alaska. It took three months to get a letter there and get a reply back again. We had to frame the answer on what we believed and from some casual conversation with the master of the vessel. My impression is that all of these interrogatories are squarely within the issues of the pleadings, but if the Court should think they are not, we will ask leave to amend our answer to conform to the proof. [89]

Mr. WALL.—That is exactly what your Honor said you would do at the time the interrogatories were taken. We said that this testimony should be taken without any privilege to amend. These interrogatories were put in the original answer. I objected to the original answer to the interrogatories. Your Honor sustained the objection to the answer and sustained the objection to the interrogatories. Then these interrogatories were prepared with the understanding that the case was to be heard on these interrogatories but with the stipulation that objections could be made as though they were taken at the trial.

Mr. HUTTON.—That is all very true, but then, on the other hand, when I amended the answer I was just as much in the dark as when I filed the original answer. It takes three months to get a letter up there and back, and I had to file an answer within 20 days in this case. I am convinced that every one of these interrogatories are relevant, but if your Honor should hold to the contrary I think, your Honor, that we have a right to amend the answer.

Mr. WALL.—That all took place sometime prior to December of last year, your Honor, and they had ample opportunity since that time to get all the information necessary.

Mr. HUTTON.—I could not get it until these interrogatories came back and they have only come back within two weeks; I could not tell what the testimony was going to be until I got the depositions back again.

(Testimony of John W. Erickson.)

Mr. WALL.—But there was mail communication during that time with Alaska.

Mr. HUTTON.—There are one or two legal points I desire to have your Honor's attention called to.

The COURT.—Is there any further testimony?

Mr. HUTTON.—That is our case.

Mr. WALL.—I will recall Mr. Erickson. [90]

[Testimony of John W. Erickson, Recalled in Rebuttal.]

JOHN W. ERICKSON, recalled in rebuttal.

Mr. WALL.—Q. Without waiving the objections made, we desire to take the testimony of the witness in rebuttal of certain answers given in the depositions. What experience have you had as master or mate or second mate of sailing vessels?

A. I have sailed as mate and second mate on similar schooners here and on the Atlantic coast. I used to sail in yachts.

Q. How many sailing schooners have you been the first mate of on this coast? A. Four I think.

Q. How long have you been going to sea?

A. 24 years.

Q. How much of that time have you spent on shore, as near as you can remember?

A. I have spent altogether about eight years on shore.

Q. How long a time were you sailing as first mate, as near as you can remember?

A. About 3 or 4 months in each ship, two or three or four months.

Q. You mean in each ship? A. Yes, sir.

(Testimony of John W. Erickson.)

Q. How many vessels were you in as second mate?

A. Two or three.

Q. And how long were you second mate in those?

A. I was four months in one, the schooner
"Volunteer."

Q. And how long in the others?

A. In one I was about two months.

Q. What sailing vessel have you been master of?

A. I was master of a pilot boat.

Q. What pilot boat? A. The "Pathfinder."

Q. Where did she sail from?

A. She sailed out here on the bar; we would hove to and wait for vessels to come in.

Q. What did you have to do in handling her in the way of picking up boats and lowering boats?

A. We hove to all the time. [91]

Mr. HUTTON.—There is no issue here about raising small boats.

Mr. WALL.—Your man says he did not know how to heave to.

A. (Continuing.) We hove to at all times; if we have our boat on the lee side as we are hove to, we throw it overboard there; if we don't we always make a tack and heave to on the other and leave the boat out and after the boat is out we pick them up again and we sail around them and get them on the lee side and heave to and hoist our boats on board.

Q. State what the fact was in regard to whether or not Hoelke ever gave you any orders at any time to turn to at any particular time. A. He never did.

(Testimony of John W. Erickson.)

Q. What were your hours for turning to while you were in Alaska?

A. I didn't have no regular hours but I used to turn out for a start at 4 o'clock in the morning, and I went down to the wharf and stayed around and waited for Mr. Hoelke to come and tell me what to do but he never did, so I would go up and eat my breakfast sometime and come out again, and then I would go around the wharf again and stay around there, and I would not know what to do, and Mr. Hoelke would pass by me a dozen times, maybe more, and he wouldn't say a word to me, and I would be standing there like a dummy.

Q. When you took the "Martha" out in the morning, what time would you start to work on her?

A. Generally we started off at about 4 or half-past 4, summer-time.

Q. What way did you have of knowing what you were to do on shore while you were ashore?

A. Only when Mr. Hoelke would tell me what to do.

Q. Did Mr. Hoelke ever tell you to do anything on shore that you did not do? A. No.

Q. How many Sundays were you on shore while you were up there?

A. Only one Sunday, as near as I can remember.
[92]

Q. Did you or not work on that Sunday?

A. I worked half a day on that Sunday.

Q. Did you or did you not ever refuse to work on Sunday when asked to do so? A. No, sir.

(Testimony of John W. Erickson.)

Q. What work did you do that Sunday that you worked?

A. We were assorting some groceries and fruit and so forth in the warehouse.

Q. Did Mr. Hoelke ask you to do that work?

A. Yes, sir.

Q. What time did he ask you?

A. About 10 o'clock, I think, in the morning.

Q. Will you state whether or not Mr. Hoelke ever had to call you after 7 o'clock in the morning?

A. No, sir.

Q. How many men usually constituted the crew of the "Martha" when she was being used?

A. Most of the time I only had one man but at times he was not in the crew.

Q. Who detailed these one or two men that were to go with you as a crew of the "Martha"?

A. Mr. Hoelke.

Q. After the men were detailed to go as crew of the "Martha," in case the "Martha" did not leave port for any reason who ordered the men ashore?

A. Mr. Hoelke.

Q. And after he got back from a trip and you tied up who gave the men orders to go ashore?

A. Mr. Hoelke.

Q. Then, as I understand it, after the crew was sent on board by Hoelke, you took charge of the "Martha" for handling her and handled her during the trip and kept command of her until she got back and tied up?

(Testimony of John W. Erickson.)

A. Yes, sir, after I sailed from the wharf.

Q. Was there ever any man idle on the trip after you took command of her? A. No, sir.

Mr. HUTTON.—I don't think that is material in this case.

Mr. WALL.—Why did Hoelke say that this man would be lying around idle on the vessel? [93]

Mr. HUTTON.—He didn't say it in that respect or in that sense; he said sometimes this man would get down two hours late and the men would be around there looking for him.

The COURT.—The objection is overruled.

Mr. WALL.—Q. State whether or not you ever had any talk with Hoelke about tide work.

A. No, sir, I never did.

Q. Will you state whether or not you ever actually did any tide work? A. Yes, sir, I did.

Q. What was it?

A. I discharged the "Martha" with salt over on the mainland once.

Q. Mr. Hoelke said in his testimony, or one of the witnesses for the defendant who testified, stated that you said you didn't come up to Pirate Cove to work and would only do so when you were ready; state whether or not you ever made such a statement of that kind.

A. I never made such a statement.

Q. State whether or not you did all the work which you were ever requested to do on shore.

A. I did everything Mr. Hoelke ever asked me to do.

(Testimony of John W. Erickson.)

Q. State whether or not there was ever any accident of any description in regard to the handling of the "Martha" while you were handling her.

A. Nothing happened to the "Martha" so long as I was on board to her.

Q. When Hoelke told you to pack your clothes and go down on the "Golden State," the next day, did he say anything to you at that time that he was discharging you because you refused to obey orders about turning to? A. No.

Mr. HUTTON.—That is objected to as leading.

The COURT.—The objection is overruled.

Mr. WALL—Q. At that time state whether or not he told you that he had someone who was more reliable and in whom he could put more trust, or anything of that nature. [94]

A. No, sir, he never said nothing like that to me.

Q. Mr. Hoelke in his testimony said something about your not keeping the sheets of the "Martha" in instead of slacking them out and running before the wind: state what the fact was in regard to that.

A. Mr. Hoelke was never with me when I had a fair wind. The channel in Pirate Cove is a very narrow channel, it is only about altogether about 10 feet wide, and of course the water is pretty low then and sandbanks stuck up quite a lot and the buoy stands there, and in order to come through there you have to haul your sheets in or else the boom will take the buoy off, or if she hauls over she will run on a sandbank, and so I guessed I did have my main sheet in coming in through the channel there,

(Testimony of John W. Erickson.)

but it was not because I didn't know better than that.

Q. He also testified you had some trouble, or he thought that you didn't heave to properly when you came in, and when he tacked around you with the launch; what is the fact about that?

A. I never hove to because at that time he used to pick me up every once in awhile outside there, as I would have no wind; at this particular time I didn't have very much wind and of course there was no cause for heaving to. His launch is very handy; he would come around my stern and come up to windward and I would throw him a line and that is all there was to it.

Q. Could his launch go faster than you?

A. Oh, yes, two or three times faster than me; I didn't have very much wind.

Q. Mr. Hoelke said your wife was up on the roof with you once when you were shingling; state what the truth was in regard to that.

A. I was shingling the store down there, putting some shingles on that had blown off, and my wife was standing down [95] below; she just came out of the house; the house I lived in was right next to the store; she was standing down below at the ladder there; she was never up on the roof.

Q. State whether or not Hoelke ever said anything to you about your wife being around while you were working.

A. He never said a word to me about that.

Q. Mr. Hoelke said that at one time you refused to load or unload the "Martha;" state what the truth

(Testimony of John W. Erickson.)

was in regard to that.

A. I never refused to load or unload the "Martha;" *state what the truth was in regard to that?*

A. *I never refused to load or unload the "Martha."*

Q. As a matter of fact, did you ever assist in loading or unloading the "Martha"?

A. I always did.

Q. Did you ever pack sacks from the "Martha" to the galley?

A. Yes, sir, I pulled the dory ashore and afterwards packed the sacks up to the salt-house on the main land.

Q. Did you ever have any conversation with Hoelke or did Hoelke ever say anything to you about whether or not he wanted you up there for that job?

Mr. HUTTON.—Objected to as leading and within the issues and not in rebuttal of anything.

The COURT.—The objection is overruled.

Mr. WALL.—Q. Did he have any conversation? with you?

A. I didn't have no conversation with him only at one time he told me—

Q. —When was this,—what time was it?

A. It was a few days—it was the time I was supposed to go to the main land.

Q. How long after you got up there?

A. About 7 or 8 days, I think, the first time he ever spoke to me.

Q. What was the conversation about? [96]

(Testimony of John W. Erickson.)

Mr. HUTTON,—We move to strike that out upon the ground it puts respondent at a great disadvantage. Mr. Hoelke was in Alaska; there was no opportunity of sending an interrogatory to him upon that matter. It comes out now for the first time at the close of the case.

The COURT.—The objection is sustained. This is like any other testimony. It would be admitted for the purpose of showing the animus of the witness Hoelke, and perhaps for discharging him, but Hoelke should have had a chance to explain it when these interrogatories were sent up.

Mr. WALL.—I don't think it is especially material; it is only because of Hoelke's testimony that all these questions are asked. I don't think Hoelke's testimony is material.

Q. Did you ever refuse to work on any holiday up there? A. No.

Q. State whether or not you worked hours longer than from 7 in the morning until 5 in the afternoon.

A. When I was in the "Martha" I was always working; of course, I had to be up night and day when I was in her and when we were sailing.

Cross-examination.

Mr. HUTTON.—Q. You had several disagreements with Mr. Hoelke up there, did you not?

A. No, sir.

Q. Never any at all?

A. Only one, and that was not a disagreement, it was only a case of my wife going with me.

Q. And you insisted upon taking her?

(Testimony of John W. Erickson.)

A. I did not insist upon taking her.

Q. Is it not a fact that you had your wife with you whenever you worked up there in Alaska?

A. No, sir.

Q. Did you take your wife with you on the vessel?

A. No, sir.

Q. Mr. Halleck objected and stopped you from doing so, did he not?

A. Mr Hoelke was the cause of my wife wanting to go with me. [97]

Q. Is it not a fact that while you were up there you asked Mr. Hoelke to change you and put you in another station? A. No, sir.

Q. You did not? A. No, sir.

Redirect Examination.

Mr. WALL.—Q. What was the conversation about your wife going with you, between you and Mr. Hoelke?

A. The conversation was this: I went down one morning as I was to sail for Sanburn, and I said to Mr. Hoelke, "Is there any objection, Mr. Hoelke, to my wife going along with me?" and he says, "No," and I says "all right," and I went and told my wife she could go along; when she came down and was ready to go then the fellow who was supposed to be with me would not go with me because my wife ~~was~~ to go along with me, and then he says, "Well, you ought to have men along with you"—

Q. You mean that Hoelke said that?

A. Yes, and he says, "If your wife goes along I can't get anybody to go with you." He promised

(Testimony of John W. Erickson.)

she could go. Then I said to the fellow who was to go along, "What's the matter with you? Won't you go along?" And he said, "No."

Q. Is that all that was said between you and Hoelke about your wife going?

A. Yes, that is about all.

**[Testimony of Mrs. John W. Erickson, for Plaintiff,
in Rebuttal.]**

Mrs. JOHN W. ERICKSEN, called for plaintiff in rebuttal, sworn.

Mr. WALL.—Q. You heard the testimony about your going on the vessel with your husband?

A. Yes, sir.

Mr. HUTTON.—That is not the way to examine the witness, if your Honor please; he should ask questions of her directly.

Mr. WALL.—We want to save some time.

Q. State whether or not you ever had any conversation with Mr. Hoelke about going on the vessel with your husband. [98]

A. On the "Martha"?

Q. Going on the "Martha" with your husband. Did you or did you not ever have any conversation—yes or no? A. Yes, sir.

Q. Where was that conversation?

A. It was at Mr. Hoelke's house.

Q. How did the subject come up?

A. Well, I wanted to go with my husband and Mr. Hoelke said I could go.

Q. He said to you there at the time that you could go? A. Yes, sir.

(Testimony of Mrs. John W. Erickson.)

Q. Was your husband present then?

A. No, he was down on the boat.

Cross-examination.

Mr. HUTTON.—Q. Is it not a fact Mr. Hoelke told you you could not go because there were only two berths on the ship and there would be no place for you to sleep?

A. That was after he came back to the house. I was still at the house; that was after he came back from the boat.

Q. He did tell you that, didn't he?

A. After he had told me I could go.

Q. He told your husband that? A. Yes, sir.

Q. And then your husband still insisted on your going, didn't he? A. No, sir.

Q. He did not? A. No, sir.

Mr. WALL.—That is the libelant's case.

[Endorsed]: Filed Sep. 23, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [99]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSEN,

Libelant,

vs.

UNION FISH COMPANY, a Corp.

Respondent.

(Opinion and Order to Enter Judgment in Favor of Libelant for \$716.05, With Interest and Costs.)

F. R. WALL, Esq., Proctor for Libelant.

H. W. HUTTON, Esq., Proctor for Respondent.

Libelant was hired for a year, his services under the contract beginning June 12th, 1914. On July 18th he was discharged without cause. For his services he was to receive \$55 per month, and board and lodging for himself and wife. The value of such board and lodging was, according to the evidence, \$55 per month. He was paid for his services up to July 18th, and board and lodging was furnished up to August 5th, 1914. He is therefore entitled to judgment for \$55.00 a month from July 18th, 1914, to June 12th, 1915, as wages, and \$55 a month from August 5th, 1914, to June 12th, 1915, for board and lodging, less such sums as he was able to earn in other employment during these periods. For wages, therefore, he is entitled to \$594 and for board and lodging he is entitled to \$562.80, a total of \$1156.80. But from this must be deducted \$440.75, being the amount earned by him in such employment as he could secure during the period. This leaves \$716.05, for which he is entitled to judgment. Judgment will therefore be entered for this amount with interest and costs.

September 8th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [100]

*In the United States District Court in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,706.

JOHN W. ERICKSEN,

Libelant,

vs.

UNION FISH COMPANY, a Corporation.

Respondent.

Final Decree.

This cause having been heard on the pleadings and proofs, and having been argued and submitted by the advocate and proctor for the respective parties, and due deliberation having been had, it is now by the Court ORDERED, ADJUSTED and DECREED that the respondent in said cause, Union Fish Company, a Corporation, pay to the libelant, John W. Ericksen, the sum of seven hundred and sixteen dollars and five cents (\$716.05), and interest amounting to the sum of thirty-seven dollars and seventy cents (\$37.70), and libelant's costs to be taxed; and that libelant have interest on said sums from the date of this decree until the same be paid at the rate of six per centum per annum.

Dated September 10, 1915.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Sep. 10, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [101]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY, a Corporation,

Respondent.

(Notice of Appeal.)

Respondent above-named, appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered and made in the above cause on the 10th day of September, 1915, and from each and every part of said decree.

To the libelant above named and to F. R. Wall, Esq., his proctor.

Dated September 20th, 1915.

H. W. HUTTON,

Proctor for Respondent.

Copy received this 20th day of September, 1915.

F. R. WALL,

Proctor for Libelant.

[Endorsed]: Filed Sep. 20, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [102]

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libelant,

vs.

UNION FISH COMPANY, a Corporation.

Respondent.

Assignment of Errors.

Comes now Union Fish Company, respondent and appellant herein, and assigns the following errors, in the record, opinion, decision and final decree in the *above entitled, to wit:*

1. The District Court erred in overruling respondents exceptions to the libel herein.

2, The District Court erred in not finding and deciding that it had no jurisdiction over the subject matter of libelants alleged cause of action.

3. The District Court erred in rendering a decree herein in favor of libelant, and further erred in not dismissing libelants libel.

4. The District Court erred in not finding and deciding that the contract alleged in libelants libel was void, as being an alleged contract not to be performed within a year.

5. The District Court erred in finding and deciding that this respondent ever made a contract to employ libelant for the period of at least a year, or

for any period at all other than at the will of either party to said contract.

6. The District Court erred in not finding and deciding that this respondent was justified in discharging libelant. [103]

7. The District Court erred in rendering a decree in favor of libelant for the sum of seven hundred and sixteen dollars and five cents and interest as specified in said decree, and in rendering a decree in favor of libelant for any sum whatever.

8. The District Court erred in rendering a decree covering compensation and including compensation for services that were to be, if performed, rendered on land.

10. The District Court erred in not finding and deciding that respondent herein did not contract with libelant and engage to hire him for at least a year, and in not finding and deciding that there was no proof that the agent whom it is claimed made such contract had authority to make such a contract.

11. The District Court erred in not finding and deciding that the language testified to by libelant did not show that a contract for at least a year had been made with libelant.

WHEREFORE said respondent prays that each of said assignment of errors be allowed and the said decree dismissed, and that it may have such other and further relief as the Court is competent to give in the premises.

H. W. HUTTON,
Proctor for Respondent and Appellant.

[Endorsed]: Filed Oct. 18, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [104]

(Respondent's Exhibit "A")

Pirate Cove, July 18, 1914.

JOHN W. ERICSEN.

Bal. Due with U. F. Co.....87.64

R. HOELKE,

Agt.

PAID.

Aug. 7, 1914.

UNION FISH CO.

25

Chgd.

62.64

"Golden State"

\$26.85

Stations

60.80

87.65

[Endorsed]: Aug. 5, 1914. Paid Coin \$25.00.

JOHN W. ERICKSEN.

U. S. Dist. Court No. 15,706. Ericksen vs. Union
Fish Co. Respts. Exhibit No. "A." Filed June 16,
1915. W. B. Maling, Clerk. By Lyle S. Morris,
Deputy Clerk. [105]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of

the United States, for the Northern District of California, do hereby certify the foregoing 105 pages, numbered from 1 to 105, inclusive, to contain a full, true and correct transcript of the records and proceedings, as the same now remain on file and of record in the office of the clerk of said District Court, in the cause entitled John W. Ericksen, Libelant vs. Union Fish Company, a Corp., Respondent, Number 15,706, which said Apostles on Appeal are made up pursuant to and in accordance with "Praeceptum" and "Additional Praeceptum for Apostles on Appeal" (copies of which are included in the foregoing transcript), and the instructions of H. W. Hutton, Esquire, Proctor for Respondent and Appellant herein.

I further certify that the costs of preparing and certifying the foregoing Apostles on Appeal are the sum of Fifty-four Dollars and Twenty Cents (\$54.20), and that the same have been paid to me by the proctor for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of November, A. D. 1915.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT.

[Ten Cent Internal Revenue Stamp. Canceled
11/9/15. C. W. C.] [106]

[Endorsed]: No. 2680. United States Circuit Court of Appeals for the Ninth Circuit. Union Fish Company, a Corporation, Appellant, vs. John W. Erickson, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed November 9, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Extending Time to November 9, 1915, to File
Apostles on Appeal.]**

*In the District Court of the United States in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

JOHN W. ERICKSON,

Libellant and Appellee,

vs.

UNION FISH COMPANY,

Respondent and Appellant.

Good cause appearing therefor, it is hereby ordered that the time for filing the apostles on appeal with the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, be and the same is hereby extended twenty days from and

after the 20th day of October, 1915.

Dated October 18th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: No. 15,706. In the District Court of the United States, Northern District of California, First Division. In Admiralty. John W. Erickson, Libellant vs. Union Fish Company, Respondent. Order Extending Time to file Apostles on Appeal.

No. 2680. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to November 9, 1915, to File Record Thereof and to Docket Case. Filed Oct. 18, 1915. F. D. Monckton, Clerk. Refiled November 9, 1915. F. D. Monckton, Clerk.

No. 2680

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

UNION FISH COMPANY (a corporation),	}
vs.	
JOHN W. ERICKSON,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLANT.

H. W. HUTTON,
Proctor for Appellant.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2680

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

UNION FISH COMPANY (a corporation),	}
vs.	
JOHN W. ERICKSON,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLANT.

In this case John W. Erickson filed a libel in the District Court for the Northern District of California, claiming breach of contract, hiring, *a part of which contract was maritime, and a part of which was non-maritime*, and in paragraph 2 of the libel he alleges:

“That in the month of May, 1914, at said San Francisco, said respondent and said libelent entered into *an oral* contract or agreement wherein and whereby it was mutually agreed that said libelent was to proceed to Pirate Cove, Alaska, *and after arrival there*, to serve the respondent as master of said schooner ‘Martha’ for a period of *not less than one year and also during said time to assist the*

manager of said respondent's salting station at said Pirate Cove when possible so to do without interfering with libelant's duties as said master of said schooner."

It further alleges that libelant proceeded to Pirate Cove arriving there June 12th; that he entered upon the performance of his duties, *part of which were performed on sea and a part on land*, and was discharged July 18th, etc.

Argument.

Exceptions were filed to the libel, overruled, respondent answered, the case was tried and judgment went for the libelant in the sum of \$716.05.

Between the time of the filing of the libel and the trial, Mr. Overton, the gentleman with whom libelant claims he had the conversation of hiring, died suddenly and respondent was without means of contradicting libelant's testimony as to a hiring for a year.

The defenses in the case are:

1st. The court had *no jurisdiction* of the alleged cause of action.

2nd. The language used in the claimed contract of hiring does not show a positive hiring for a year.

3rd. There is no proof that Mr. Overton, the party who it is alleged hired libelant, had any authority to hire libelant for any fixed period.

4th. The alleged contract of hiring was void.

I.

THE DISTRICT COURT HAD NO JURISDICTION OVER THE ACTION.

In this case the contract was part maritime and part non-maritime. Libelant was not a seaman, *he was not a fisherman* going out in a boat in Alaska to fish; *he had nothing to do with fishing*; his duties were to sail the "Martha" when she was to be sailed, the rest of the time he worked on shore, as he claims, as assistant to the superintendent. The services of a superintendent are no more maritime than are those of a ship's agent, or the latter's clerks, stenographer or telephone girl. Let us see what he did.

The first work he did was to take his things ashore which took him the first *three days*; *then he helped the agent around*; then he shingled a roof; then he packed codfish tongues, and he also cleaned up around the station (pages 64 and 65).

At page 87 libelant testified as to what he was to do.

"A. And to assist Mr. Hoelke in counting fish and helping in general around the station."

On the same page, he said it was four or five days after he arrived at Pirate Cove before he went out on the "Martha"; that trip took one day, and two or three days after that he started on another trip. He then made a trip of three or four days and stayed on shore two days. Then he made a trip of five days; two days after that he started on another trip

which took him two days, then he stayed on shore one day, and made another trip which took two days.

On pages 87 and 88 libelant testified as to how long he was on shore and how long at sea, for a portion of the time, and the summary of it is, he was at sea *thirteen* days and on shore *fourteen* days, doing (page 88):

“A. I done what I was asked to, bundling up sacks, and I shingled some roofs and I packed some tongues; one day Mr. Hoelke was away and I counted the fish, otherwise he told me he did not trust me to count fish.”

Hoelke, respondent's superintendent, in answer to Interrogatories VII and VIII gives libelant twenty days altogether as master and nine days on shore, the character of the work being (page 45):

“It was general utility work, such as shingling, tying up empty sacks and sweeping out the different warehouses.”

(page 44): “He was to be acting as captain of our small tender, the schooner ‘Martha’, but when the vessel was not in use he was supposed to make himself generally useful about the station.”

It is very clear that a part of libelant's services were to be and were performed on land. *Unless the whole were to be performed on the sea*, the court had no jurisdiction. The law is as follows (The Pennsylvania, 83 C. C. App. 139-142):

“It is not enough that the contract includes a maritime adventure among its objects, or that it was to be performed at sea. *Unless it*

was purely maritime, it was not one of which a court of admiralty had jurisdiction."

In the language of Justice Clifford, in *The Belfast*, 7 Wall. 637:

"Contracts, claims, or services, *purely maritime*, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty court.

"Contracts of a *mixed nature are not cognizable* in these courts and that there is sufficient reason for this is well illustrated by the present case. Here is the ordinary contract between school proprietors and persons, with the further provisions that the school is to be located on shipboard, and in the course of instruction is to include a foreign voyage and studies in nautical and naval matters. Combined with the provision of common law obligation are some that may relate to maritime services. *How can a court of admiralty separate the liabilities and apportion the damages arising from the breach of the maritime part of the contract,*" etc.

How can it be done in this case? The "Golden Gate", tender for the station was there while Erickson was in Alaska, and we suppose that the "Martha" had to run around more than usual to carry a cargo of salted fish to send down. At other times he might have been on shore all the time.

Plummer v. Webb, 4 Mason 380:

"I cannot say the *whole contract* is here of maritime nature. There is mixed up in it obligations *ex contractu* not necessarily maritime, and so far the contract is of a special nature. *In cases of a mixed nature, it is not a*

sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

That language was quoted and approved by the U. S. Supreme Court in *The Steamboat Orleans*, 36 U. S. 175. In the case of *Grant v. Poillon*, 61 U. S. 168, the Supreme Court said, approving *Willard v. Dorr, a master's case*:

"In the case of *Willard v. Dorr*, 3 Mason 91 (it should be 161), it was held, '*no suit for services performed by the master, as a factor, or in any other character, than that of master, is cognizable in the admiralty, merely because the consideration of the contract is maritime. The whole contract must in its essence be maritime, or for compensation for maritime services.*'"

The above quotation from *Willard v. Dorr*, is from the syllabus. The language in the decision (page 167), is:

"For any other service performed by him, as agent or factor, *independent of his character as master, he can have no claim here; for such claims are not within the cognizance of admiralty.*"

The decision in *Grant v. Poillon* further says:

"An agreement by the master of a vessel to pay wages, may be sued upon in the admiralty; but a stipulation in the same contract to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law (*L. Arira v. Manwaring Bee's Rep.* 199). The admiralty jurisdiction of the United States, being exclusive, cannot be ex-

tended to cases of law or equity, cognizable by the Circuit and State courts, under the 11th section of the judiciary act (1 Baldwin, 554).

“A contract between two persons, one of whom had chartered a vessel, whereby he was to act as master, and the other as mate of the vessel, and the two were to share equally in the profits of the contemplated voyages, was held not to be within the admiralty jurisdiction (*The Crusader*, Ware’s Rep., 437).”

In the case of *The Richard Winslow*, 18 C. C. A. 344-346, it is said:

“Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature. But there was joined with it a contract with respect to the cargo after the completion of the voyage, that was in no respect maritime in its nature. If as Judge, now Mr. Justice Brown observes in the *Pulaski*, 33 Fed. 383, the storage were a mere incident to the transportation, the entire contract would be held to be maritime, and within the admiralty jurisdiction. But here the contract for holding the corn in storage *did not concern the navigation*. It could not take effect until after completion of the voyage, and had no relation to further transportation of the cargo by the vessel. *It was to be performed at a time when the vessel was not engaged in commerce or navigation or in the preparation therefor* (cases cited). The reason is that such service does not pertain to the navigation of a ship, nor assist a vessel in the discharge of a maritime obligation.”

In this case the “*Martha*” was not even a fishing vessel; she was used in the codfish business. In that business men, of which the libelant was not one, went out in boats and caught fish with lines;

the fish then taken on shore split and salted; when sufficient were on hand, and the "Golden Gate" was there to carry them to San Francisco, the "Martha" went to different stations, collected some of the fish and carried them to where the "Golden Gate" was. That service was unquestionably maritime, but the work on shore was not incidental to that work. "It was to be performed at a time when the vessel was not engaged in commerce or navigation or in preparation therefor" as appears in the above quotation, and again such work did not pertain to the navigation of the vessel, or assist her, the "Martha", in the discharge of a maritime obligation. Nor did it have anything to do with the catching of fish, as it was performed after the fish were caught and cured, just as the storage of the cargo in the Richard Winslow case was done.

In the cases of *Domenico v. Alaska Packers Association*, and in the case of *Larsen v. North Alaska Salmon Company*, the agreement was in substance as follows:

"Work and labor in the capacity of
SEAMEN, FISHERMEN, BEACHMEN, TRAPMEN.
Also to work on boats, lighters, steamers and
in salteries, canneries and/or in another capacity,
up and down at and about NUSHAGAK or
elsewhere in Bristol Bay District, Alaska, as
directed by the superintendent, during the
salmon fishing season of 19....."

That whole contract was a salmon fishing contract. Under it the men had, if required, to go out in the boats and catch fish, also catch them in traps, work on boats, lighters and steamers. The whole contract

was maritime. The contract was also general. Some of the men signing as fishermen, beachmen and cannery men being designated as such, signing the same contract, and it was fishermen that were involved in both cases. In the Larsen case, Larsen was hurt while throwing salmon from a barge, the barge was on the water, and of course it was an admiralty tort.

There is certainly a distinction between the case of where a man has to work in a boat, catch fish, either in a trap or boat, work on a steamer, boat or lighter, *as directed by the superintendent*. The superintendent's duties were not maritime, *and the case of a man who assisted the superintendent would not be maritime*. The latter's service not being maritime, the managing owner of a vessel does not perform maritime services. He may appoint a master of a vessel, or engage seamen, the master and seamen go on board, and while there perform maritime services just as salmon fishers do; but supposing a man assists the managing owner in doing that work, sweeps out warehouses, ties up salt sacks, shingles roofs, and does general utility work, all on shore, he is certainly not performing maritime services any more than the clerks and stenographers of a managing owner does.

In the case of *Krohn v. The Julia*, 37 Fed. 369, a master of a vessel agreed to carry charcoal to a place designated by the owner of the charcoal, sell it and account for the proceeds. There was a contract of affreightment blended with a contract of

sale, and the court, Judge Pardee, held that the whole matter was non-maritime on account of its mixed nature. See also:

Turner v. Beachem, Fed. Cases, No. 14,252;
Richard v. Hogarth, 94 Fed. 685.

II.

THE LANGUAGE USED DOES NOT SHOW A HIRING FOR A YEAR.

Libelant gives three different versions of the hiring. The substance may in general be about the same, but we do not admit that it is. It is found first on page 25:

“I would like to have you go up there for at least a year, or longer if everything is all right, and when you get through with the job, of course, we will bring you back.”

(Page 86). “Of course, we wouldn’t send up anybody for less than a year under no circumstances, * * * and I said, ‘*if I can get along*, I don’t want to come down in a year’.”

(Page 97). “‘I would like to have you go up there for at least a year or longer *if everything is all right*, and when you get through with the job of course we will bring you back’ was that correct as far as you went? A. Yes, sir.

Q. And Mr. Overton did say that, then?

A. Yes, sir.

Q. I would like to have you go up there for at least a year or longer *if everything is all right*?

A. For at least a year.”

After testifying to the qualifying clause three times, the witness then left it out.

That language, however, was not a positive hiring for a year; it was always conditional *that libelant was satisfactory*. The language "*if everything is all right*" qualifies everything that it was used in connection with.

Libelant was not satisfactory to respondent, as it appears. Answer to Interrogatory X, page 45, shows libelant would not run to at proper hours.

Answer to Interrogatories XI and XII are to the same effect (same page).

Answer to Interrogatory XIV, page 46, reads:

"A. The only orders he did not obey was in the matter of getting to work on time. I asked him several times why he did not, and the only answer I got was that he did not come to Pirate Cove to work and would only do so when he was ready."

The answer to Interrogatory XV shows he was discharged for that reason. The answer to Interrogatory XV, page 50, shows he refused to assist in loading and unloading the "*Martha*", telling Mr. Hoelke, the superintendent, *that he would not do it for him or any other man* (same page).

He was told to clean out a warehouse and tie up some sacks and did not do it.

It also appears that he always insisted on having his wife with him whenever he was working whether on the roof of a house or anywhere else.

It is very clear that libelant was not satisfactory to the respondent, and the job not satisfactory to

him. He testified *he had to stand around like a dummy* (page 104).

Testimony of Updall (page 54):

“I should say that libelant was very indifferent as to how he performed his work, from the fact that he once told me that he was not satisfied with the way things were at Pirate Cove, also that he would not work on holidays or before 7 A. M. or after 5 P. M.”

Wallstedt testified (page 67) that he heard Erickson tell Hoelke that he was dissatisfied with the place and wanted to come down (page 67). When libelant left Alaska he procured a statement. It is found on page 119 of transcript. He went to the office of the respondent with it, *was satisfied that was all he was entitled to*, and asked for \$50.00 extra (page 92).

We submit the statement, and its *payment was a settlement in full*, and that there was not any absolute hiring for a year; but the same was on the condition that libelant should prove satisfactory.

III.

THERE IS NO PROOF OF AUTHORITY ON THE PART OF MR. OVERTON TO HIRE LIBELANT FOR A YEAR.

There is no proof who Mr. Overton was. Libelant testified he was the “managing owner of the Union Fish Company”. A motion was made to strike that out (page 83), and it should have been stricken out. The burden was on libelant to show authority

for the hiring and that someone in authority had such authority. The mere statement of a person, not an officer of a corporation, that a man, naming him, is the managing owner, is no proof at all.

If Mr. Overton was the general manager of respondent he would *not have authority to hire a master for a year.*

A general manager may hire a person, but not for a fixed time.

If Mr. Overton was general manager of the corporation, his term was one year; he could not hire a person whose term would run over into that of another managing owner, in the event that one was selected. The decisions on this question, as far as we have been able to find them, are as follows:

In the case of *Smith v. Co-operative, etc.*, 12 Daly 304, the hiring was for one year, and it was held that in the absence of express authority from the board of directors, the general manager had no right to hire for any mixed period.

In the case of *Reupke v. Stuhr*, 126 Iowa 632, the hiring was for one year, and the same decision was rendered. The same rule was laid down in

Camacho v. Hamilton, 2 N. Y. App. Div. 368-9;

Red Cross Protective Association v. Wayle, 171 Fed. 643.

The case of *Jenkins S. S. Co. v. Preston*, 108 C. C. A. 473, is a case where a master was hired for two years by a contract in writing. A great

quantity of evidence seems to have been introduced to show that the managing owner had authority to make the contract. *In this case there was none.*

It appears in that case that the hiring was made in May, the discharge took place the following January. The general manager testified that he was the whole concern; he was a large stockholder, the board of directors never met, and the court found that it must be assumed that the directors knew of the contract and had ratified it by acquiescence.

This alleged contract is alleged to have been made in May, broken in Alaska at a place where there is but one mail each month, and broken in July, and sued on in August.

IV.

THE ALLEGED CONTRACT OF HIRING WAS VOID.

About two hundred and fifty years ago, the law-making powers of England, to prevent frauds which were constantly occurring, owing to, in some cases, the death of witnesses, in others by their removal and absence, lack of memory and change of conditions, passed what is known as the Statute of Frauds. The legislatures of about every state in the Union have enacted the same statute. California and Alaska, where this alleged contract was to be performed, has.

Sec. 1624 of the Civil Code of California, reads:

“The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent.

“1. An agreement that by its terms is not to be performed within a year from the making thereof.”

Sec. 1044 of the Alaska codes is identical.

It is alleged that the contract was oral, was made May, 1914, and the services were to commence when libelant arrived in Alaska; and that he was to work *for not less* than a year thereafter; that he arrived June 12th; so this contract is clearly within the above language.

The lower court held that an admiralty court will not be bound by Statutes of Fraud, etc. In this the court was in error.

This alleged contract was made in the office of appellant on Clay Street, in San Francisco. Libelant undertook to assert a claimed right under certain language. Respondent *had just as much right to claim that the language gave no rights to libelant as the latter had to claim rights under it.* The contract was absolutely void when made. *A contract void where made is void everywhere.* No authorities are necessary on that point.

Now libelant could not have enforced the contract in the courts of the state where made or in Alaska, so when and at what time did it get its validity? If it was void in one court, it would be void in all

courts. And how can it happen that because libellant selected an admiralty court to try his case, *that respondent lost its otherwise perfect defense?*

In so far as this defense is concerned, it is not a *matter of jurisdiction*; it is solely a question of *the rights* of the respective parties, and rights given by a state statute are always recognized in an admiralty court. The decisions are uniform on that point. We cite the following. In 13 Wallace 236, the court said, on page 243:

“It is urged further that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any federal court; but that is not aquation in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity, or admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked *to give effect to the right* by applying the appropriate remedy. *This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal.*”

We ask, at this stage: Does a defendant forfeit his rights because he, in a civil suit, is forced to defend in a federal court?

“Jurisdiction having attached, *his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality.* In no class of cases has the application of this principle

been sustained by this court more frequently than in those *of admiralty and maritime jurisdiction.*"

The language

"and its determination is governed by the same considerations as if it had been brought in the proper State tribunal of the same locality",

means that the libelant has the same cause of action, and the respondent has precisely the same defenses. *It does not mean that a defense is lost because the party who sues happens to select one court in preference to another.* It certainly does not mean that an admiralty court will enforce a right given by a state statute *and not protect one.*

A defense that is good in one court, *if no international or international commercial law questions* are involved, is good in all courts.

A contract is to be interpreted according to the law of the place where it is to be performed, provided it is not void where made. This contract was to be performed partly on land in Alaska, and partly on the inland waters of Alaska, and was void where made and at the place of its performance. It is not like the case in 129 U. S. 443, where the contract was made in New York, to be performed on a British vessel, completed in Great Britain, and the damaged occurred there. That contract was international.

Of course if Congress had legislated upon this matter to the contrary we admit that the defense would not be good, but it has not.

In *Thompson v. Phillips*, 1 Baldwin 274, it is said:

“It cannot be doubted that in a suit in a state court, this law would be the rule of decision on the rights of the parties; it is difficult to perceive a reason why a different rule *should be adopted in this court.*”

Orleans v. Phoebus, 11 Peters 184:

“The local law can never confer jurisdiction on the courts of the United States; *they can only furnish rules to ascertain the rights of parties* and thus assist in the administration of the proper remedies.”

Lorman et al. v. Clarke, 2 McLean 563-573:

“Now can it be said that, in a case like this, the jurisdiction of the court is derived from the local law? As in all other cases which do not arise under the laws of the Union, *the local law governs the contract or right* but the power to act is derived from the laws of the Union.”

All of our pilot, insurance, local maritime liens laws at one time, were or are created by state laws. There is scarcely a contract relating to maritime affairs that is not made on land, and if such a contract is void, and there is no federal statute covering the same matter, such contracts are never enforced.

In the case of *The Hamilton*, 207 U. S. 398, it is said (page 405):

“We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. *Being valid, it created an obligation, a personal liability of*

*the owner of the Hamilton to the claimants.
* * * This of course admiralty would not
disregard, but would respect the right when
brought before it in any legal way."*

How is it possible that that language does not apply to rights of a person who is sued, as well as one that is suing?

Courts of admiralty and courts of equity are in some respects similar. If the Statute of Frauds is binding on the District Court in an equity case it is also binding upon it in an admiralty case. The following were Statute of Frauds cases:

Purcell v. Minor, 4 Wallace 513-517.

"The statute which requires such contracts to be in writing, is equally binding on courts of equity as courts of law."

Whitney v. Hay, 191 U. S. 77-84.

"It is obvious that courts of equity are bound, as much as courts of law, by the provisions of this statute: and therefore they are not at liberty to disregard them."

Moses v. Lawrence City Bank, 149 U. S. 303.

Those were cases where it was claimed that a United States Court sitting on its equity side could not take cognizance of a state Statute of Frauds.

Crowley v. Northern Pacific Railroad Co.,
159 U. S. 569, 582:

"While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, *with the original rights of the parties*

unchanged. * * * A party going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals. Other cases to the same effect are *Holland v. Challon*, 110 U. S. 15; *Marshall v. Holmes*, 141 U. S. 569, and other cases cited."

The mode of procedure in this case was of course different in the admiralty court to what it would have been in the state court. Libelant would have no cause of action in the state court. How can he give himself a cause of action because he happens to go into another court of equal jurisdiction over his claimed contract; and how can the other party lose his defense? This is not a case of jurisdiction, but a case of rights.

If it could be held that the Statute of Frauds did not apply to libelant's services as master it certainly *did apply to his service on shore*, and *how can an entire contract be severed?* This one was not capable of severance; it was \$55.00 per month for the whole service.

We submit that the language claimed to have been used by Mr. Overton, even if he had the power to hire libelant for a year, is too shadowy to create a contract for a year; that there is no proof that he had any authority to make such a contract; that the contract was void and that the court had no

jurisdiction over the subject matter of the libel,
and that the judgment should be reversed.

Dated, San Francisco,
March 11, 1916.

Respectfully submitted,

H. W. HUTTON,

Proctor for Appellant.

No. 2680.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

IN ADMIRALTY

UNION FISH COMPANY (a Corporation),
vs.
JOHN W. ERICKSON,

Appellant,

Appellee.

Appellee's Answering Brief.

F. R. WALL,
Proctor for Appellee.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO

Filed

MAR 1 1916

F. D. Monckton,

No. 2680

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UNION FISH COMPANY (a corporation),	}
<i>Appellant,</i>	
vs.	}
JOHN W. ERICKSON,	
	<i>Appellee.</i>

APPELLEE'S ANSWERING BRIEF.

I.

THE COURT HAD JURISDICTION.

The libel was for the breach of a maritime contract; not for breaching a contract in part maritime; and this is most clearly shown by what this Court said in the case of the *North Alaska Salmon Company v. Larsen*. We quote:

“We find no merit in the contention that the cause of suit is not within the admiralty jurisdic-

tion of the court, in that appellee's contract for services as a seaman, fisherman, beachman, trapman, *'and such other services as might be required,' by the appellant's superintendent, was not a maritime contract.*

"In *Alaska Packers' Ass'n. v. Domenico*, 117 Fed., 99, this court affirmed the jurisdiction in admiralty of a contract made by men who acted as seamen on a voyage to and from salmon fishing grounds in Alaska to work as fishermen during the season, *and assist in canning fish on shore*, and in loading them on board for transportation, notwithstanding that the men while engaged in fishing slept on shore, and mended their nets and cared for the fish on shore. See, also, *The Virginia Belle* (D. C.), 204 Fed., 692; *McRae v. Bowers Derdging Co.* (C. C.), 86 Fed., 344; *Disbrow v. The Walsh Bros.* (D. C.), 36 Fed., 607." *North Alaska Salmon Co. v. Larsen*, 220 Fed., pp. 94 and 95.

Appellant's attempt to distinguish the Larsen and the Domenico cases from this one is necessarily futile, because, of course, there can be no difference in principle in assisting the manager on shore, when possible so to do without interfering with libellant's duties as master, and in performing "such other services as might be required by the appellant's superintendent" or in assisting "in canning fish on shore."

In the Domenico case, the trial Court said (112 Fed., 556): The contract "included work in the canning on shore, in preserving the fish caught by them"; and this Court (117 Fed., 100 and 101): "The libelants arrived there early in April of the year

mentioned, and began to unload the vessel *and fit up the cannery.*" So that case shows that the men did work on shore that was not directly connected with the catching of fish.

Appellant does not yet comprehend what point was decided in the Larsen case. That case did not sound in tort, but in contract. As we said in our brief in the trial Court:

"In the Larsen case, Larsen testified (Apostles therein, page 23): 'I fished up to the 10th of June (then) I was called ashore *to work ashore*; we started in to discharge fish. When I was discharging fish I worked in a lighter.' The fact that Larsen was working in a lighter, at the very time he was hurt, seems to have caused some confusion in respondent's mind. The Larsen case did not sound in tort; so jurisdiction was not taken because of the locality of the accident. It was a libel for breaches of the contract of good treatment; and all of the breaches occurred *while the libelant was on shore*; so the appellate court sustained the jurisdiction not because of any locality of the injury, but because *a maritime contract was breached.*"

"Upon such a contract, and all its incidents, the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says Curtis, J., in *Church v. Shelton*, 2 Curt., 271, 274, 'will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve.' See also, *Cox v. Murray*, Abb. Adm., 342; *The J. F. Warner*, 22 Fed. Rep., 342; *The W. A. Morrell*, 27 Fed. Rep., 570; *The Baracoa*, 44 Fed. Rep., 102." *The Electron*, 48 Fed. Rep., 690.

“Where a provision of a charter party for a foreign vessel, though not in itself maritime in character, is so connected with the other stipulations therein as to render it an essential part of the contract, and it appears probable that without it the contract would not have been entered into by the owners, a court of admiralty has jurisdiction of an action for an alleged breach of such provision.” *Keyser v. Blue Star S. S. Co.*, 91 Fed., 267, syllabus.

“If it (a court) have power over the principal matter, it has it also over the incidents. If it have power to begin, it has power to finish, although in its course it may be called upon to consider and decide matters, which, as original causes of action, would not be within its cognizance.” *Ben. Adm.*, 4th Ed., Sec. 16.

“If a contract is maritime in itself it carries all its incidentals with it, and the latter, though non-maritime in themselves will be heard and decided.” *Ben. Adm.*, 4th Ed., Sec. 143.

The whole contract here was in its essence (that which constitutes the particular nature of this contract) both for maritime services and for compensation therefor. In fact, *all* of the services rendered here were maritime in their nature, in that they were in furtherance of the main enterprise in which appellant was engaged and of which the Martha was a part. This enterprise was the furthering of appellant's business of catching fish and shipping them to market, and in which enterprise there were working at respondent's salting station at Pirate Cove during the time the libelant was a part thereof, “including

Hoelke and the libelant," "about thirty men" (p. 49). In answer to a cross interrogatory to state in detail in what capacity the men there employed were employed, Hoelke said (p. 49): They were principally engaged in fishing. At other times they would be employed in unloading and loading the Golden State. And to the next cross interrogatory, as to how many of the men employed there were engaged in fishing, he said "about 30 men" (p. 49).

So that *all* who were working there, *including Hoelke and the libelant*, were principally engaged in fishing or in loading or in unloading the Golden State. In furtherance of that enterprise, the libelant was master of the Martha; and when not actually commanding her, he did "odd jobs, such as shingling roofs, packing codfish tongues, bundling empty salt sacks, counting fish and keeping the Martha in condition for sea and ship shape" (p. 26); all of which were incidental and subsidiary to his contract and in furtherance of the main object of the enterprise of which the Martha was an essential part.

II.

THE CONTRACT WAS FOR A YEAR.

In answering appellant's contentions under this subdivision it is necessary first to get a clear idea of what the issues are and the findings of the trial Court thereon. It then becomes apparent that the testimony shows, without any contradiction, that there was a

hiring for a year, and that appellee was discharged without cause.

It will be observed by the Court in this connection that both the original answer and the amended answer were sworn to by the appellant's president, Mr. Pew (not by Mr. Overton), and that the libel called for an answer to every allegation under oath; that both the original answer and the amended answer say that the contents thereof are true of Mr. Pew's own knowledge, except as to the matters alleged on information or belief. Among the matters that Mr. Pew swore were true of his own knowledge, and not on information or belief, are:

That appellee becoming dissatisfied with his employment, it was mutually agreed between appellant and appellee that appellee's services should end (From Original Answer, pp. 13 and 14);

That thereupon appellee was discharged, to which discharge he assented (Amended Answer, p. 19).

That no period of service was ever agreed to; that libelant was hired for a time not specified (p. 16); that no term of service was mentioned or agreed upon (p. 18).

Nowhere is it pleaded that the discharge was any other than a discharge by mutual consent.

The trial Court found that appellee was hired for a year, and that he was discharged without cause (p. 114).

The testimony of appellee was taken in open court,

and it was peculiarly within the province of the trial Judge to determine the effect of the language used by the witness, and that determination would not be changed by this Court, even if the matter here were doubtful, which it is not.

We submit that the utterly obvious meaning of the testimony upon this point is that the appellee was to go up there for at least a year; and, after the year, to stay longer, if everything was all right.

We say that is the natural construction, which is strongly reinforced by the inherent improbability of any man's quitting a good job on San Francisco Bay and consenting to go to Pirate Cove, Alaska, to be "fired" at any time the inclination of the agent in that out-of-the-way place might dictate.

In addition to the findings of the Judge, we call this Court's attention particularly to the fact that Mr. Pew, appellant's president, who swore that it was true, of his own knowledge, that there was no time specified in the contract, was in court (pp. 89 and 90), and that he failed entirely to enlighten the Court upon this or any other point.

The remainder of appellant's brief under this subdivision has nothing to do with any of the issues made in this case. The libel says the appellee was discharged without cause; the answers say he was discharged by mutual consent.

The admiralty is the most liberal forum in the world, but it is not a ship's fo'c'sle for growling about

everything under the sun, without making an issue thereon:

The respondent "must put before the court the grounds of his defense, in an answer containing suitable allegations, that the court, as well as the opposite party, may be informed of the grounds of defense . . . whatever may be the prayer of the libel; any party defending the suit must spread before the court the grounds of his defense, or he will be debarred from making his defense, it being a primary rule in admiralty, that the cause must be heard and decided according to the allegations as well as the proofs in the cause." *Ben. Adm.*, 4th Ed., Sec. 391.

The effect of defenses thus solemnly made cannot be changed by any subsequent turning or changing or seeking to direct the Court's attention to something irrelevant and immaterial (*The Markee*, 3 Fed., 45, aff'd. 14 Fed., 112; *Hutson v. Jordan*, Fed. Cas. No. 6,959 at page 1,092).

All of the testimony referred to on pp. 11 and 12 of appellant's brief was received by the trial Court subject to libelant's objections (as testimony in admiralty always should be received). Those objections are to be found on pages 99 and 100 of the Apostles, and we are satisfied this Court will find them well taken; for aside from the alleged defenses as to the hiring and the jurisdiction, the only other alleged defense is that of discharge by mutual consent.

There is not a word of testimony to support this alleged consent discharge. The libelant denied that

he ever asked for or consented to his discharge, and Hoelke himself disproves the allegation most emphatically when he says: "I discharged him for the reason that he refused to obey me regarding the working hours" (p. 46). Yet neither Hoelke nor anyone else gives a single instance of libelant's disobedience regarding working hours; and Ericksen's testimony shows that he was always ready, willing and able to work between 6 a. m. and 5 p. m., and that he often worked longer hours; that he always did everything that he was told to do, and that Hoelke never at any time gave him any instructions or orders as to when he was to turn to. And when Hoelke was asked definitely, "Did you ever give the libelant any definite order or orders when he was to start to work?" (p. 39), he answered evasively (p. 50) that when Ericksen "arrived at Pirate Cove I told him "to take a couple of days to get settled down and "then to report for work. I showed him what to do "in odd jobs around the station." And yet again, when asked (p. 39), "Did the libelant ever refuse to do any work that he was definitely ordered by you to do?" he says nothing about any definite neglect or refusal to conform to working hours; but gives an instance (p. 50), which Ericksen denies, and which had nothing to do with the reason given by Hoelke for the discharge, and the instance itself is in direct contradiction of what Hoelke had just said, "The

only order he did not obey was in the matter of getting to work on time" (p. 46).

The Court, on ample testimony, found that the discharge was without cause; so that the testimony referred to in appellant's brief has nothing to do with the issues made by the pleadings under oath.

These irrelevancies are in keeping with the statement in appellant's brief (p. 2), regarding the death of Mr. Overton. There is nothing properly in the record that justified any such statement; there is no showing that Mr. Overton's testimony could not have been taken after the filing of the libel; there is nothing to show that if Mr. Overton had testified he would have contradicted libelant's testimony, and in the face of the sworn pleadings and of all of the circumstances of the case, the suggestion that he would have done so is one of those gratuitous contributions to the record that only darkens counsel with words without wisdom; and, like all matter improperly injected into a cause, should militate against the litigant bringing it in, as we have no legal way of traversing the same.

Under this subdivision, appellant makes a few remarks to the effect that Exhibit "A" (p. 119) was a settlement in full. Such a contention certainly can not be offered seriously in the admiralty, where a receipt is a receipt for the amount received and it is nothing more, unless it is specifically understood

and agreed that it covers other matters. And appellant, while saying here (Brief, p. 12), that libelant was satisfied, says, in the same breath, he asked for more (Brief, p. 12). And counsel for appellant, in his brief below, said:

“In this case libelant brought a statement of his account from Alaska the statement is in evidence, after collecting that money, he offered to settle this claim for \$50.00, of course we concede that that is not binding on him if his claim is good, but it is to be taken into consideration in the whole case.”

Now, of course, the Court cannot take into consideration any offer of compromise made prior to suit. The law fixes the measure of the libelant's damages; and after waiting as long as he has, he is entitled to what the law allows him. In the language of the Supreme Court, in the case of *Roehm v. Horst*, 178 U. S., 15, referring to its decision in *Pierce v. Tenn. etc. R. R. Co.*, 173 U. S., 1, he is entitled “to treat
“ the contract as absolutely and finally broken, and in
“ an action recover the full value of the contract to
“ him at the time of the breach, including all that he
“ would have received in the future as well as in the
“ past, deducting any sums that he might have earned
“ or that he might thereafter earn.”

III.

AUTHORITY TO HIRE FOR YEAR.

We repeat here that "any party defending the suit " must spread before the Court the grounds of his " defense, or he will be debarred from making his " defense, it being a primary rule in admiralty, that " the cause must be heard and decided according to " the allegations"; and we say appellant has nowhere pleaded lack of authority on the part of Mr. Overton to hire libelant for a year. So this Court will not go into an alleged issue not made by the pleadings, unless the pleadings are amended and notice given within the time prescribed by rule 7 of the rules in admiralty of this Court, which time has long since elapsed (*The Minnie*, 225 Fed., 36; *Paauhau, etc. Co. v. Palapala*, 127 Fed., 921, and *The Flottbek*, 118 Fed., 958, and the cases cited by this Court in the two last-named cases). Therefore, this objection could not be considered, if there were any merit in it.

The objection is, however, without merit, as appears below:

The decisions drawn by appellant from the common law are without application, either to the principle or to the particular facts of this case.

Whether or not Mr. Overton had authority to hire for a year depends necessarily upon all of the circumstances connected with this particular case. There can, of course, be no doubt of the general principle that

a corporation knows those things that it ought, by proper diligence, to have known, as to the general course of its business, and that it may be presumed to have known these things in any contest between the corporation and those who, justified by the circumstances, have dealt with its agents or servants upon the basis of that course of business. The particular facts of this case are:

The appellee had been working for the appellant, as a master of one of its launches about the Bay of San Francisco for several months prior to May, 1914; that he then spoke to Mr. Cox, a clerk for the appellant, about getting a job from appellant in Alaska as station boss; that Mr. Cox said he would speak to Mr. Overton; that a day or two after that libellant went to appellant's main office in San Francisco, as he was in the habit of doing, and there saw Mr. Overton, the only person with whom he talked in contracting for the job that he afterwards secured; that appellant was engaged in the fishing business in Alaska and apparently Mr. Overton was its general manager; that Mr. Overton also hired him to go up on one of the appellant's boats, the *Golden State*, as the second mate thereof; that the contract here sued on was partially executed at the time that the libellant was discharged.

With these facts in mind, there can be no doubt of the binding effect of the contract made.

In the case of *Baton Rouge & B. S. Packet Co.*

et al. v. George, 128 Fed., 914, one George George was hired as a pilot by the corporation, for a year, the master of the vessel doing the hiring orally. There was part performance, and in all other respects the case is on all fours with the one at bar. The conclusion of the trial Court, that the contract was binding, was upheld by the C. C. A., 5th Cir., and libelant recovered his damages for its breach.

The case of the *Wanderer*, 20 Fed., 655, was that of a purser for his wages for the entire year, who was discharged without cause before the end of the term. We quote therefrom:

“The libelant had made a contract of service for one year. He performed part of the contract, and was ready and willing to perform the residue, but was prevented by the master of the vessel, who discharged him without cause. He sues to recover the balance due on his salary for the year. If he performed his duty while in the service of the vessel, and was ready and willing to perform it for the residue of his engagement, and was discharged without due cause, and was unjustifiably prevented from completing his contract, his rights are the same as if he had completed it. He is entitled to his wages for the whole year, and was entitled to sue for them on his discharge. He has been paid a part of his wages, and sues for the balance.

“In the case of a contract for an ordinary seaman’s wages, the lien should not, perhaps, be extended beyond a single voyage, as that is the usual time for which his engagement is made. But the case of a purser stands somewhat on a different footing. His connection with the vessel is gener-

ally more permanent than that of a common seaman. He represents to some extent the owners, and his qualifications are of such a character that a competent purser cannot usually be employed for a single trip. We, therefore, do not think an engagement of a purser for a year an unreasonable one, and such an engagement, we think, would be binding on the boat."

And in the case of the *Ira Chaffee*, 2 Fed., 401, the Court says:

"It must now be considered as settled that if the ship enters upon the performance of its work, or any step has been taken toward such performance, the ship becomes pledged to the complete execution of the contract."

In the case of the *Mary Elizabeth*, 24 Fed., 398, the Court says:

"Under these circumstances I think it is clear that if there is any doubt as to whether the contracts made by the master with the libelants were within the scope of his agency and authority, and binding on the owners, there can be no doubt that the owner ratified the contract by silence and apparent acquiescence. The agency to contract with the libelants actually existed under the law of the case and the direction of the owner. It was therefore the owner's duty, being present, to have informed himself of the terms and conditions of the contract. Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act. *Story, Ag.* (4th Ed.), 256. *It would not be equity to allow the principal to stand by and make no inquiries, and then avail himself of*

the contract made in his behalf, and, after part performance, repudiate the contract as one made without authority.

“In the case of *Jackson* there is evidence to show that the owner and present claimant was fully informed before the rendition of any services of the terms of the contract, and further that he expressly ratified it at a later day; but as the evidence on these points is conflicting, I base my decision on the ground that the owner was silent when he should have spoken.”

“The propeller, having entered upon the agreement to tow the libelant’s barge during the entire season of 1894, is answerable in rem for the breach of the agreement by abandonment of the barge in September.” *The Oscoda*, 66 Fed., 348.

The case of *Kells v. Boyd*, 31 Fed., 621, was that of a master suing for his wages. It is evident from the report that all of the agreements were oral. The cause was decided by the Court on its merits, without regard to the fact that there was no written agreement. *Brown v. Hicks*, 24 Fed., 811, was a case identical in principle with the one at bar, except that the agreement was written. Recovery was allowed. *Brennan v. Peter Hogan & Co.*, 147 Fed., 290, was, apparently, on an oral contract, and recovery was allowed. *Parsons v. Terry*, Fed. Cas. 10,782, was for breach of contract, and recovery was allowed for the season on which the ship was about to enter when the master was discharged. *Lombard S. S. Co. v. Anderson*, 134 Fed., 568, is also in point. It was a libel for wages by the master of a “tramp” steamer, who sued

for his wages from the time he was discharged in Manila, until he returned to New York, the port of his shipment, which wages, the Court allowed. There was there, evidently, no written agreement, for the Court says:

“The appellee did not prove that he had been employed as master for any particular voyage, *nor for any special period of time* . . . The owners of the steamship had the right to remove the master at any time, and without assigning any cause, and without being liable for damages, *unless they had, by the terms of their contract with him, yielded that right*, which it seems that they did not do.”

IV.

THE STATUTE OF FRAUDS HAS NO APPLICATION.

The contract was a maritime contract, entire in its nature; and appellant's contentions here are opposed by the specific language of the Supreme Court and of this Court.

“The opinion of the Supreme Court (in the case of the *Resolute*, and the *Wm. Hoag*, 168 U. S., 437, and 168 U. S., 443) therefore, settle that the contract of the master is maritime.” *Hughes on Adm.*, p. 27.

The manner in which the Supreme Court of the United States has disposed of the particular question here is stated in the language following, taken from

the cases of *Workman v. Mayor, etc. of New York*, 179 U. S., p. 560 *et seq.*:

"The decisions of this Court overthrow the assumption that the *local law* or decisions of a State can deprive of all rights to relief, in a case *where redress is afforded by the maritime law*, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States. . . . In *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S., 443, a *maritime contract executed in New York* was held to be an *American contract*, and the *local law* of New York was declared *not* to govern in its construction. . . . In the *Max Morris case*, 137 U. S., 14, the question for decision was, whether, in a court of admiralty, in a case where recovery was sought for personal injuries to the libelant arising from his negligence, concurring with that of the vessel 'any damages can be awarded or whether the libel must be dismissed, according to the rule *in common law cases*.' It was held that 'the mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred through the negligence of the officers of the vessel, does not debar him entirely from a recovery.' "

This case establishes as controlling authority, in a case like the one at bar depending in a court of admiralty, where the subject-matter is essentially maritime in its nature, that the place of execution of the contract does not determine upon what equitable principles this Court will administer justice. All contracts for service between a seafarer and his employer, made in the different States of the United States, are Ameri-

can contracts, essentially. They may be performed in any part of the world, and an admiralty court enforces them according to the maritime law. This very principle was considered and decided adversely to appellant's contentions by this Court in the case of *Pac. Coast S. S. Co. v. Bancroft-Whitney Co.* We quote from the opinion in that case in 94 Fed., at page 188:

"The questions raised by appellant as to the applicability and effect of the sections of the Code of Civil Procedure and statute of limitations . . . will be considered together.

"The fact that the bill of lading was signed within the State of California, before the goods were shipped on board the *Queen*, and that the freight was to be delivered at a port within the State, does not bring the contract within the provisions of the statutes of California. . . . These libels were brought under, and by virtue of, the maritime laws of the United States. In the exercise of their admiralty and maritime jurisdiction, the United States Courts are governed solely by the legislation of Congress and the general principles of maritime law, *and are not bound by State statutes.*" Citing cases.

The case of *Olson v. Oregon Coal and Nav. Co.*, 104 Fed., 576, was a libel for tort, where the contract for services between the master and servant was made in California. In that case this Court said (p. 576): "It is true that the present case is to be determined, not by the common law, but by the rules of the maritime law."

If the bill of lading in the Queen, *supra*, ^{or} ~~and~~ the claim for damages for personal injuries in the Max Morris, *supra*, had been sued on in the State court, as each might have been, the defendant would have had a complete defense under the State law: in the admiralty, in cases arising under the maritime law, these defenses, given by the State law, are not considered; but, as the Supreme Court says in the Workman case, *supra* (p. 563), it is "*the duty of the admiralty court to grant relief in accordance with the principles of the maritime law*" (Court's italics).

We submit that the Court will here enforce this maritime contract according to the rules of the maritime law; and the maritime law permits the master of a vessel to recover for a breach of an oral contract for services, without reference to State statutes, if the claim be not too stale to be enforced by the admiralty.

It is respectfully submitted the decree should in all things be affirmed.

F. R. WALL,
Proctor for Appellee.

No. 2680

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION FISH COMPANY (a corporation),
Appellant,

VS.

JOHN W. ERICKSON,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Clerk

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNION FISH COMPANY (a corporation),
Appellant,
 vs.
 JOHN W. ERICKSON,
Appellee.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

THE STATUTES OF CALIFORNIA MAKE THE CONTRACT ENFORCED BY THE LOWER COURT INVALID—NOT MERELY UNENFORCEABLE. THE ONLY QUESTION BEFORE THE COURT IS THEREFORE: CAN A STATE MAKE A MARITIME CONTRACT ENTERED INTO WITHIN IT INVALID?

This petition for a rehearing in the above entitled cause is solely concerned with the application of section 1624 of the Civil Code of the State of California to contracts executed within California. All other questions involved in the case are, by comparison, of merely

casual importance. Although their determination is a serious matter to the litigants herein yet their general effect is very limited. But it is entirely different with the treatment by the court of the above section. For upon the settlement of that question rests much of the power of the states.

The facts involved bring this out. As pleaded and as found by the lower court the facts were that in May, 1914, the respondent and the libelant entered into an oral agreement at San Francisco, California, whereby it was mutually agreed that the libelant was to proceed to Pirate Cove, Alaska, and serve the respondent as master of the schooner "Martha" for a period of not less than one year after his arrival. The libel sets up that before the one year had elapsed, the respondent without justification discharged the libelant. In the lower court it was held that the libelant was entitled to recover his wages for the entire year less such sums as he was able to earn in other employment during that period.

The defense that such a contract was invalid under section 1624 of the Civil Code of California was made in both the lower and the upper courts.

The Civil Code of California reads in part:

"§ 1624. The following contracts are *invalid*, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof;"

The section quoted, while unquestionably suggested by the original Statute of Frauds (29 Charles II, c. 3, par. 4), is not copied from it but is phrased in distinctly different language.

The paragraph of the original statute corresponding to the section of the California law reads:

*“No action shall be brought * * * (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the memorandum upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto lawfully authorized.”*

Thus under the statute of Charles II, it was declared that an action could not be brought, for instance, upon a two year oral contract, while in California such a contract is made invalid.

The distinction between two such statutes is clear—one referred only to the procedure while the other destroyed the validity of certain contracts made in a certain way.¹ This was early recognized.

In 1852 Jervis, C. J., discussed section 4 in the following language:

*“The statute in this part of it does not say that unless those requisites are complied with the contract shall be void, but merely that no action shall be brought upon it. * * * The fourth section*

¹California by her statutes recognizes that section 1623 of the Civil Code has nothing to do with procedure. The Code of Civil Procedure regulates the proceedings of the state courts in cases involving contracts to continue for more than a year. C. C. P. 1973.

relates only to the procedure and not to the right and validity of the contract itself.”

Leroux v. Brown, 12 C. B. 801.²

In the consideration of the enforceability of oral contracts made outside the jurisdiction, the language of the Statute of Frauds applicable has been all important.

Where the statute affects the remedy by declaring that no action shall be brought upon certain oral contracts, then suit may not be brought in that jurisdiction although the contracts are absolutely valid where made.

Buhl v. Stephens et al., 84 Fed. 922.

On the other hand, if such contracts are made void in a state, contracts made in other states and valid where made, may be enforced in the first state although if made there they would have been void.

Allen v. Schuchard, Fed. Cases 236 (affirmed 1 Wall. 359).

These cases are merely in accordance with the general rule declaring:

“Matters bearing upon the execution, the interpretation and *the validity* of a contract are determined *by the law of the place where the contract is made*. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility

² For a recent case not involving the Statute of Frauds but dwelling on the distinction between statutes making contracts unenforceable and those making contracts invalid, see *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489.

of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.”

Scudder v. Union National Bank, 91 U. S. 406, 413.

R. C. Minor, in his authoritative work on the “Conflict of Laws” has summarized the general rule in the following manner:

“If it is alleged that the contract is void, because not in writing, it is a question of the formal validity of the contract, to be determined by the *lex loci celebrationis*.” (Section 173.)

“But if by the ‘proper law’ of the oral contract it is provided that ‘no action shall be brought’ thereon unless it be in writing, while the *lex fori* does not require it to be in writing, obviously the *lex fori* does not raise any question of the impairment of the obligation of the contract. On the contrary, it enforces the obligation to a greater extent than would the ‘proper law’ of the contract. In this case, therefore, the matter is one pertaining to the remedy, to be controlled by the *lex fori*.” (Section 210.)

We are here then considering the effect of a state statute which makes the agreement found between respondent and appellant *invalid*. Under established principles of law it cannot be enforced in any other state whatever the laws of that state in regard to oral contracts may be. It cannot be enforced because the *lex loci contractus* determines the validity of every contract and under the provisions of the *lex loci contractus* such a contract was expressly declared invalid.

The only argument that can be made for the enforcement of the agreement found by the court below is therefore that in an action in admiralty a state

statute making a maritime contract invalid will be considered as totally ineffective by the court. This brings us to a consideration of the extent of the power of the admiralty over maritime contracts.

B.

JURISDICTION OF ADMIRALTY OVER CONTRACTS ENTERED INTO ON LAND WAS EARLY DISPUTED. IT LATER WAS DETERMINED THAT ADMIRALTY EXERCISED CONCURRENT JURISDICTION WITH THE COMMON LAW COURTS IN THE ENFORCEMENT OF SUCH CONTRACTS.

Before examining the recent cases dealing with admiralty jurisdiction over maritime contracts it will be advisable to consider briefly the former position of such agreements.

The Constitution, article III, section 2, provides:

“The judicial powers shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases involving ambassadors, other public ministers and consuls;—*to all cases of admiralty and maritime jurisdiction*;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state or the citizen thereof; and foreign states, citizens or subjects.

“Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over

all navigable waters and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only.”

Jackson v. Steamboat Magnolia, 20 How. 280, 300.

The Acts of Congress conferring jurisdiction is therefore determinative of the power of the courts.

Congress at once gave the federal courts jurisdiction over admiralty matters and the present law (differing only slightly from the earlier statutes) reads:

“Section 24. The district court shall have original jurisdiction as follows:

“Third: Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.” (Judicial Code Act, March 3, 1910. Compare Act of Sept. 24, 1789, Ch. 20.)

A dispute arose almost immediately as to the extent of the admiralty jurisdiction. Similar controversies as to the powers of admiralty had existed in the English courts for more than a century previous and these controversies had resulted in the complete victory of the partizans of the common law over their rivals of the admiralty. It was only natural that those patriots in America who believed in the right to trial by jury as something almost sacred did not relish an advance in power of a court which sat without a jury. And while ostensibly they might wish to appear

opposed to the admiralty for other reasons, no step toward building up strong federal judicial powers appealed to the ardent states rights defenders of the period.

Those who may be termed the little admiralty advocates upon the earliest opportunity claimed that in accord with the English law of the period, with a few minor exceptions, the admiralty had no jurisdiction over maritime contracts executed on land. Their hopes were however destined for disappointment. During 1815, Mr. Justice Story, acting as circuit judge, in one of the most learned admiralty opinions ever rendered in America, held that in this country the admiralty has jurisdiction over all maritime contracts.

DeLovio v. Boit, Federal Cases, 3776.

After a most searching review of the English law of admiralty the court states:

“On the whole, I am, without the slightest hesitation ready to pronounce, that the delegation of cognizance of ‘all civil cases of admiralty and maritime jurisdictions’ to the courts of the United States comprehends all maritime contracts, torts and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations), which relate to the navigation, business, or commerce of the sea.” (Vol. 7 Fed. Cas. 444.)

The strength of this opinion did not, however, silence the opposition. Its doctrines were ably controverted and strenuously resisted by several of the justices of the Supreme Court, and especially by Mr Justice Johnson (see *The John B. Cole*, Fed. Cases, 16,

875). The last named justice rendering a concurring opinion in *Ramsay v. Allegre*, 12 Wheat. 611 (1827), expressed forcibly his common law attitude toward the admiralty.

The occasion for his action was as stated by him:

“I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions.” (page 614.)

Referring to the enforcement of contracts in admiralty under the English law, he declared:

“But, right or wrong, it is not to be questioned at this day, that the admiralty have lost their jurisdiction over contracts, with the exceptions stated. The most animated advocates of admiralty do not deny this. They mourn bitterly over its fall, but uniformly acknowledge that they are eulogizing the dead.” (page 621.)

But the vehemence of Mr. Justice Johnson in his denial of the powers of admiralty jurisdiction over maritime contracts were not availing. Mr. Justice Story lived to declare during 1845 in an opinion of the Supreme Court that

“over maritime contracts the admiralty possesses a clear and established jurisdiction, capable of being enforced in *personam* as well as in *rem*.” (*Andrews v. Wall*, 3 How. 568, 572.)

See also

N. J. Steam Navigation Co. v. The Merchants Bank, 6 How. 344.

The whole drift of judicial opinion was moreover toward the recognition of the theories enunciated in

DeLovio v. Boit, supra; *The John B. Cole*, Federal Cases 16,875; *Willard v. Dorr*, Federal Cases 17,679; *Gloucester Ins. Co. v. Younger*, Federal Cases 5,487. While every advance in the admiralty jurisdiction was fought by the judges believing strongly in the common law, after 1845 there was no longer any question of the jurisdiction of admiralty in *personam* over maritime contracts wherever made.

The attitude of the common law and admiralty courts in matters where they both had jurisdiction was at first a troublesome question. By 1858, however, this doubt was settled.

“The relation of the District Courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: ‘Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners’ wages and marine torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation,’ continues the commentator, ‘would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was

concurrent, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. *This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common law jurisdiction.*' 3 Story's Com. sec. 1666, note."

Taylor v. Carryl, 20 Howard 583 at 598.

At the outbreak of the Civil War the jurisdiction of the admiralty over all maritime contracts was established and the concurrent jurisdiction of the common law courts was equally well settled. But for the purposes of this petition it must be remembered that it was only after a long controversy that the jurisdiction of admiralty over maritime contracts was allowed. And any claim that such jurisdiction has always been acknowledged in the United States is without foundation.

C.

THE WORKMAN CASE, 179 U. S. 552, WAS NOT A REVOLUTIONARY DECISION. IT MERELY APPLIED WELL SETTLED PRINCIPLES AND HELD THAT IN ADMIRALTY AS IN EQUITY THE FEDERAL COURTS WILL NOT BE BOUND BY DECISIONS OF STATE COURTS.

The lower court disposed of the application to the contract of section 1624 of the California Civil Code with the mere statement:

“In a suit in admiralty involving a contract so purely maritime as the hiring of the master of a vessel the court will not be bound by the Statutes of Fraud or of limitations of individual states.”³

The court very evidently had in mind not the California act directed against oral contracts but the original statute of Charles II. As heretofore pointed out, the statute of Charles II merely related to the procedure and not to the right and validity of the contract itself. Since manifestly a state cannot control the procedure of a federal court, had the statute been in the words of the original act, the court of admiralty might consider oral contracts as though there were no Statute of Frauds anywhere. This is a useless discussion since the California statute does not concern the remedy but altogether invalidates the contract.

The Circuit Court of Appeals, however, in effect took up the real question—what if the state did declare the contract invalid, as a maritime contract, is it not valid in admiralty irrespective of any action by the state?

This court, in giving its reason for holding the contract valid although it had been made invalid by the statutes of the state, said:

“In the case of *Workman v. New York City, Mayor, etc.*, 179 U. S. 552, 560, the court (four of the justices dissenting) distinctly adjudged that

³ The language used by the lower court is slightly confusing. The admiralty court assuredly either must refuse to recognize the Statute of Frauds or else always be bound by it. For the court to have power to declare the contract of one man valid and to hold an identical contract made under similar circumstances void, would reduce justice to mere mockery. It is not like a Statute of Limitations in being adapted to partial enforcement.

neither the local law nor any of the decisions of a state can deprive one of the right to relief 'in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.' "

Before entering into a consideration of the Workman case *supra* it is necessary to note that we have been unable to locate any decision in which the validity of an oral maritime contract to continue for more than a year has ever been upheld. Presumably, although it is open to argument, the Statute of Frauds after its enactment by Parliament was not adopted by admiralty courts as a rule of decision. Before California enacted the above section (C. C. §1624) and had no statute on the subject, an oral contract of such a nature might have been enforced in admiralty. This is important because it results in the holding of this court not that the California statute will be disregarded because it took away a right of long standing—but that it will be disregarded because it seeks to take from parties making contracts a right which the court adjudges they would have had if there had been no statute. In other words, if a state statute results in an attempted change of a personal right under a maritime contract, that statute will be disregarded in admiralty.

The Workman case, *supra*, had under consideration the question of the liability of a city for injury to a vessel by a fireboat owned by the city and in the custody and management of its fire department. The collision was caused by the negligent handling of the fireboat while hastening to assist in putting out a

fire raging at the head of a dock. The district court, on the assumption that the local law controlled, determined that by that law, as declared by decisions of the courts of the State of New York, the city was liable for the injury caused by the negligent management of its fireboat (63 Fed 298). The decision of the lower court was reversed by the Circuit Court of Appeals (67 Fed. 347) and the case came before the Supreme Court on a writ of certiorari. By a bare majority the court held the city liable upon the ground that the maritime and not the local law governed the determination of the liability.

Since the rendering of the opinion extravagant claims have been made by certain advocates as to the extent to which the decision went. A careful study of the opinion will show that these claims are totally unjustified and that no overwhelming step toward depriving states of power was taken by the court.

It must primarily be carried in mind that the action involved a tort and not a contract, and that the state "law" overridden was simply the common law principles laid down in the state courts. And as before stated, so close were the state court decisions that Brown, D. J., certainly a most able judge, held that under them the city was liable.

The limited extent of the decision is shown clearly by the much quoted statement in the opinion:

"The decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action

maritime in its nature and depending in a court of admiralty of the United States.” (page 560.)

Admittedly no state statute can regulate the jurisdiction or practice of the United States courts (*The Lottawanna*, 21 Wall. 558).⁴ For instance, the federal courts in admiralty are not governed by the state Statutes of Limitation (*The Key City*, 14 Wall. 653).⁵ A state

“The attitude of the courts toward encroachment on federal equity jurisdiction has been as marked as their holdings as to the invalidity of the federal admiralty jurisdiction.

“We have repeatedly held ‘that the jurisdiction of the courts of the United States over controversies between citizens of different states, cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.’ *Hyde v. Stone*, 20 How. 175; *Suydam v. Broadnax*, 14 Pet. 67; *Union Bank v. Jolly’s Administratrix*, 18 How. 503. If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation and is uniform throughout the different states of the Union.”

Payne v. Hook, 7 Wall. 425, 430.

This is exactly the same position that has been taken toward admiralty.

“As the constitution extends the judicial power of the United States to ‘all cases of admiralty and maritime jurisdiction’ and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures.”

Butler v. Boston and S. S.S. Co., 130 U. S. 527, 557.

⁵The federal courts in admiralty and in equity have the same attitude toward limitations statutes. Referring to maritime liens the Supreme Court declared in *The Steamboat Key City*:

“While the courts of admiralty are not governed in such cases by any Statute of Limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.”

The Steamboat Key City, 14 Wall. 653, 660.

“In equity cases the federal courts are not bound by the Statute of Limitations. In those courts the question of laches is paramount, though they will act, or refuse to act, in analogy to such statute.”

Sullivan v. Ellis, 219 Fed. 694, 698 (C. C. A. 8th Cir. 1915).

cannot affect the application of the Limited Liability Act in admiralty (*Butler v. Boston and S. S.S. Co.*, 130 U. S. 527).⁶ Contributory negligence does not wholly bar recovery in admiralty (*The SS. "Max Morris"*, 137 U. S. 1).⁷ In *The J. E. Rumbell* it was held merely that the admiralty court would determine the priority of maritime liens upon maritime principles (148 U. S. 1).

All these cases cited as the basis of the court's holding in the Workman decision are cases of procedure or jurisdiction. They do not pass upon the validity of any contract enforced in admiralty but are only concerned with the powers of the states to regulate the admiralty courts. Naturally the states have no such power or the federal jurisdiction in admiralty would be carried on subject to the approval of the states.

⁶As pointed out in *The Lottawanna*, 21 Wall. 558, the constitutionality of the Limited Liability Act was sustained not as within the power of congress under the admiralty clause but as being within the commerce clause. Indeed the decision in which the validity of the statute was upheld declared:

"There is not here as in *Allen v. Newberry*, 21 How. 244, a question of admiralty jurisdiction under the law of 1845 (5 Stat. at p. 726), but of the power of Congress over the commerce of the United States."

Lord v. S.S. Co., 102 U. S. 541, 545.

As a valid act under the commerce clause no state legislation could limit its operation. This is equally true of any valid federal act which regulates commerce such as the Federal Employers Liability Act of April 22, 1908. *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 501.

"In the absence of statutory regulation, the fellow servant rule and its interpretation becomes a matter of general law as to which the federal courts apply their own rules of decision; and the status of Wallace as to being a vice principal or a mere fellow servant is to be determined in this case by the decisions of the federal courts rather than those of *Mississippi B. & O. R. R. Co. v. Baugh*, 149 U. S. 368."

Moss. v. Gulf Compress Co., 202 Fed. 657, 661 (C. C. A. 5th Cir. 1913).

The only case cited by the court in support of the above quotation and which seems to affect the court in admiralty in considering a matter of right as distinguished from jurisdiction or procedure is *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443. Here the validity of a contract was under consideration.

The court said in part:

“It was argued for the appellant that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence.” (Cases cited.)

“But on this subject as in any question depending upon mercantile law and *not upon local statute or usage*, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. (Cases cited.) The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.”

This rule that the federal courts are not bound by decisions of state courts upon questions of general jurisprudence or general commercial law has always been recognized (*11 Cyc.*, 901). As stated in the quotation above, this rule only applies to state court deci-

sions and does not apply to statutes. But if a state legislates regarding a matter of general commercial law the federal courts necessarily are bound by the statute enacted.⁸

When, therefore, we examine the principles of the Workman case in the light of the decisions upon which it rests, we find no extreme holding—no seizure of power by an admirer of the admiralty jurisdiction. It is simply what Mr. Justice White declares it to be: a mere application of well recognized rules. And these rules are that no state by statute or otherwise can infringe upon the jurisdiction or the procedure of admiralty—and that in cases of maritime law the admiralty courts will not be bound by the decisions of the state courts. It is true that this opinion like many others contains certain expressions which if torn from the context seem almost revolutionary. But when viewed as they lie embedded in the decision it is seen that their radical aspects have been a pure illusion.

In the consideration of the facts here involved the Workman case gives us no assistance. We are not considering a problem of procedure or of jurisdiction.

⁸The effect of state statutes is particularly well brought out by the courts in their consideration of negotiable instruments.

"The notes are undoubtedly Kansas contracts; and while we are not bound to follow the view expressed by the highest tribunal of the state upon general principles of the common law merchant (*Oats v. National Bank*, 100 U. S. 239; *R. R. Co. v. National Bank*, 102 U. S. 14; *Dyert v. Vermont Loan & Trust Co.*, 94 Fed. 913; *Northern Nat. Bank v. Hoopes*, 98 Fed. 935; *Phipps v. Harding*, 70 Fed. 471). When, however, a state has adopted a negotiable instrument law by statute, we must give force and effect to such law in all cases where the same is applicable."

Smith v. Nelson Land & Cattle Co., 212 Fed. 56, 59.

No conflict of decisions between the admiralty and the state courts is sought to be reconciled.

There is one question before the court and only one:

Is a state powerless to declare invalid contracts executed within it when those contracts are maritime in their nature?

D.

CONTRARY TO THE PLAIN MEANING OF THE WORDS OF THE CONSTITUTION AND TO THE OPINIONS OF THE COURTS IT IS PROPOSED TO THROW THE MARITIME LAW IN THIS COUNTRY INTO UTTER CHAOS BY HOLDING THAT CONGRESS HAS EXCLUSIVE AND ENTIRE RIGHT TO REGULATE MARITIME CONTRACTS.

Unfortified by the Workman case or by any other case, with its face set not only against the plain meaning of the words of the constitution but against the whole drift of judicial opinion as indicated by the decisions of the Supreme Court since 1789, it is now proposed that this court hold that states have no power over maritime contracts and by so doing attempt to plant federal sovereignty over a new domain and to seize from the states a power heretofore unquestioned. By making this holding the court will in effect read into section 8, article I of the Constitution the words: "The Congress shall have power * * * to regulate maritime contracts." But the court will be going even farther than this. In the construction of the powers granted to Congress in the above section,

it has been held that where state statutes affecting interstate commerce are local in their nature and where Congress has not acted, the statutes are valid. But to sustain the libellant's contention in the present case the court must hold that all state statutes invalidating maritime contracts are void—regardless of whether or not Congress has legislated on the subject.

If states have no power to declare maritime contracts invalid it is evident that they have no power to regulate them. For regulation by its very meaning in prescribing one form of contract makes unlawful contracts not made in conformity with law. By announcing the powerlessness of the states to regulate maritime contracts, the court is in effect declaring unconstitutional all state statutes regulating such contracts. For an unconstitutional law is merely one of no force and effect and this is exactly what a state statute will be if the admiralty declines to recognize its validity.

Such power in the federal government has been heretofore completely unsuspected. Since the earliest times states have enacted laws maritime in their nature. Hundreds of statutes have been passed dealing with charters, contracts of affreightment, pilotage agreements, marine insurance policies, etc. No one has ever questioned the power of the state to pass such laws. Whole chapters of the Civil Code of California are devoted to the regulation of maritime contracts. The state and federal courts in common law and equity

and admiralty have applied the statutes without one suggestion that they were invalid.⁹

When Congress regulated maritime matters, its power so to do was carefully sustained by the Supreme Court as an exercise of its authority under the commerce clause.¹⁰ That court again and again was declared in admiralty as in equity that no state had power to infringe upon the jurisdiction of the federal court. But no implication was ever made that under the judicial section of the Constitution, power to regulate a right, power to regulate maritime contracts was taken from the states. The court might equally well hold that under the judicial section all power to regulate contracts between citizens of different states was

⁹Quite the reverse in the case of *The Hamilton*, the Supreme Court squarely held that in the admiralty a state statute conveying a right would be enforced.

"We pass to the other branch of the first question,—whether the state law, being valid, will be applied in admiralty. Being valid, it created an obligation—a personal liability of the owner of the *Hamilton* to the claimants. (*Slater v. Mexican R. R. Co.*, 194 U. S. 120, 126.) This, of course, the admiralty would not disregard but would respect the right when brought before it in any legitimate way. *Ex parte McNeil*, 13 Wall. 236, 243."

The Hamilton, 207 U. S. 398, 405.

This case is simply in accord with the decisions holding that a state statute giving a right clearly within admiralty jurisdiction will be enforced in admiralty. Instances of such rights created by states are the statutes giving rights arising out of death by wrongful act. See *The Harrisburg*, 119 U. S. 199. So also with state statutes creating liens for supplies furnished domestic vessels (*Rodd v. Heartt*, 21 Wall. 558). Similarly a state statute giving a new equitable remedy will be enforced in the federal courts in equity (*Reynolds v. Crawfordsville Bank*, 112 U. S. 405).

¹⁰"The scope of the maritime law, and that of commercial regulation is not coterminous, it is true, but the latter embraces much the largest portion of the ground covered by the former. Under it Congress has regulated the registry, enrollment, license and nationality of ships and vessels; the mode of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime." (*The Lottawanna*, 21 Wall. 558, 577.)

removed from the individual states and conferred upon the federal government alone.¹¹

Suddenly this court has held that a state has no power to declare a maritime contract invalid. The invalidity of hundreds of statutes is patent. The law of ships, of marine insurance, of stevedoring and all other maritime subjects is thrown into utter confusion. And the admiralty is granted powers which even its most ardent advocates had not dared to hope for.¹²

Rarely does a case present a pure problem of law as does the action now under consideration. The question of law stands out completely stripped of all questions of fact. In the future the decision rendered or to be rendered by this court cannot be distinguished by any allusions to the facts. The facts are not

¹¹As has been pointed out in the foot notes the courts have gone no further in making clear the inviolability of admiralty than they have of federal equity jurisdiction. Yet courts of equity constantly enforce state Statutes of Frauds. See such cases as *Kennedy v. Bates*, 142 Fed. 51; *Horton v. Stegmeyer*, 175 Fed. 756; *Ducie v. Ford*, 138 U. S. 587. Can any one imagine the claim that state statutes making contracts invalid need not be considered by the federal courts sitting in equity.

¹²To take away the power of a state to regulate maritime contracts seems a clear denial of the principle stated by the Supreme Court in enforcing in admiralty a state pilotage statute:

"It is urged further that a state law could not give jurisdiction to the District Court. That is true. A state law cannot give jurisdiction to any federal court, but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in a proper federal tribunal whether it be a court of equity, of admiralty or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality."

Ex parte McNeil, 13 Wall. 236, 243.

involved. For that reason the opinion is almost certain to become a leading case. If the decision of the lower court stands, then states have practically no power over maritime contracts. The former functions of the state will be henceforth regulated solely by the federal government. A great step will have been taken in tearing down the power of the state and in building up that of the nation.

Whether or not the law is to become thoroughly hostile to the theories of the state once acknowledged in this country we do not know. But we are absolutely confident that before determining that the power of the federal government is so great and that of the state so limited, it will be well for the future of American jurisprudence, that further consideration be given to the advisability of such a revolutionary change in the constitutional law of the United States.

For this reason we respectfully request that a rehearing of the case be had and that the effect and the wisdom of the decision upon our law be more fully argued before this court.

Dated, San Francisco,
September 11, 1916.

H. W. HUTTON,
*Proctor for Appellant
and Petitioner.*

THOMAS A. THACHER,
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Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

THOMAS A. THACHER,

*Of Counsel for Appellant
and Petitioner.*

